60A Am. Jur. 2d Perjury Summary

American Jurisprudence, Second Edition | May 2021 Update

Perjury
Romualdo P. Eclavea, J.D.

Correlation Table

Summary

Scope:
This article discusses perjury, generally, including the nature and definitions thereof; elements of the offense of perjury; particular conduct as constituting perjury; criminal prosecution of a perjury case and matters of practice and procedure related thereto; defenses and the effect of privileges and immunity provisions on such prosecution, punishment, and sentencing upon conviction for perjury; and civil liability for perjury. In addition, the article discusses subornation of perjury, attempts to suborn perjury, and conspiracy to commit perjury, with discussion generally with regard to the nature and definitions of such concepts, prosecution of cases involving such offenses and related matters of practice and procedure, and sentence and punishment upon conviction for such offenses.

Federal Aspects:
This article discusses the federal offenses of perjury, subornation of perjury, and false declarations before a federal grand jury or court. Particular statutes discussed in this article concern perjury, generally; subornation of perjury; and perjury by false declarations before a grand jury or court.

Treated Elsewhere:
Accused's rights with regard to use at trial of false and perjured testimony, see Am. Jur. 2d, Criminal Law §§ 1200 to 1204

Administrative hearing officer's warning to witnesses that representations made in proceedings are subject to statutory penalties for false statements, in lieu of administration of oaths and affirmations, as sufficient to notify witnesses of gravity of hearings and need for complete truth, see Am. Jur. 2d, Administrative Law § 343

Cautionary instructions concerning testimony of witnesses and effect of jurors' knowledge of witness' prior conviction for perjury thereon, see Am. Jur. 2d, Trial § 1028

Collateral attack: on judgment based on false statements or fraudulent representations of party or false testimony of witness, see Am. Jur. 2d, Judgments § 753

Contempt, making of false statements under oath as, or punishment for contempt on basis of court's opinion that witness is committing perjury, see Am. Jur. 2d, Contempt § 81

Defamation, generally, see Am. Jur. 2d, Libel and Slander §§ 1 et seq.

Fraud, generally, see Am. Jur. 2d, Fraud and Deceit §§ 1 et seq.

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Judge's conduct or statements during trial: propriety of presence of jury during commitment of witness for perjury, see Am. Jur. 2d, Trial § 161; warnings by judge to witnesses as to penalties for perjury, see Am. Jur. 2d, Trial § 230

Judgment, relief on grounds of perjury committed by party obtaining, see Am. Jur. 2d, Judgments § 699

Jurors, effect of falsity of statements made on voir dire examination, see Am. Jur. 2d, Jury § 168

Malicious prosecution based on false information provided for criminal prosecution, see Am. Jur. 2d, Malicious Prosecution § 24

Oath or affirmation, purpose to make person taking such amenable to prosecution for perjury, see Am. Jur. 2d, Oath and Affirmation § 6

Obstruction of justice: as distinct from perjury, generally, see Am. Jur. 2d, Obstructing Justice § 6

Pleas, admissibility in prosecution for perjury of statement made in course of proceeding regarding guilty plea which is later withdrawn, plea of nolo contendere, or statement made in course of plea discussions with attorney for prosecutor which do not result in plea of guilty or which result in plea of guilty later withdrawn, see Am. Jur. 2d, Evidence § 535

Private cause of action for perjury, existence of, see Am. Jur. 2d, Torts § 45

Witnesses: disqualification for conviction for perjury or subornation of perjury, see Am. Jur. 2d, Witnesses §§ 195, 196

Research References:

Westlaw Databases

All Federal Cases (ALLFEDS)

All State Cases (ALLSTATES)

American Law Reports (ALR)

West's A.L.R. Digest (ALRDIGEST)

American Jurisprudence 2d (AMJUR)

American Jurisprudence Legal Forms 2d (AMJUR-LF)

American Jurisprudence Proof of Facts (AMJUR-POF)

American Jurisprudence Pleading and Practice Forms Annotated (AMJUR-PP)

American Jurisprudence Trials (AMJUR-TRIALS)

Code of Federal Regulations (CFR)

Federal Procedure (FEDPROC)

Federal Procedural Forms (FEDPROF)

Uniform Laws Annotated (ULA)

United States Code Annotated (USCA)

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60A Am. Jur. 2d Perjury I Refs.

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I. In General

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Research References

West's Key Number Digest

West's Key Number Digest, Perjury 1, 2, 16, 41

West's Key Number Digest, Sentencing and Punishment 113, 1502

A.L.R. Library

A.L.R. Index, Perjury
West's A.L.R. Digest, Perjury 1, 2, 16, 41
West's A.L.R. Digest, Sentence and Punishment 113, 1502

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60A Am. Jur. 2d Perjury § 1

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I. In General

§ 1. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 1, 2

Perjury, which is now largely controlled by statute,[1] has been defined at common law as the willful assertion as to a matter of fact, opinion, belief, or knowledge made by a witness in a judicial proceeding as part of his or her evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether in open court, in an affidavit, or otherwise, such assertion being known to the witness to be false and being intended by him or her to mislead the court, jury, or person holding the proceeding.[2]

The various statutory definitions of perjury do not differ greatly from the common-law definition; the offense is generally defined as the willful and corrupt false swearing or affirming, after an oath lawfully administered in the course of a judicial or quasi-judicial proceeding, as to some matter material to the issue or point in question.[3] "Perjury" is also defined as the act or an instance of a person's deliberately making material false or misleading statements while under oath.[4] The crime of perjury is committed if with intent to deceive and with knowledge of the statement's meaning a person makes a false statement under oath or unsworn declaration.[5] A perjury statute criminalizes the making of false statements, not the creation of false impressions.[6]

Under federal law,[7] a defendant testifying under oath commits "perjury" if he or she gives false testimony concerning a material matter with willful intent to provide false testimony rather than as a result of confusion, mistake, or faulty memory.[8]

Distinction:

The federal offense of misprision of felony, which may involve a mere refusal to give any statement, is different from perjury, which requires a false statement.[9]

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Observation:

Before a federal court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath.[10]

Under the Model Penal Code, a person is guilty of perjury if, in any official proceeding, he or she makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material, and he or she does not believe it to be true.[11]

Regardless of the setting, perjury is a serious offense that results in incalculable harm to the functioning and integrity of the legal system, as well as to private individuals.[12] Accordingly, a perjured utterance is not evidence or testimony to a crime but the very act of a crime itself.[13]

CUMULATIVE SUPPLEMENT

Cases:

For written perjury cases under California law, the false statement must be in writing under penalty of perjury in circumstances permitted by law, as opposed to under oath, and statement must be a willful statement of any material matter that witness knew to be false. Cal. Penal Code § 118(a). Ho Sang Yim v. Barr, 972 F.3d 1069 (9th Cir. 2020).

Under California law, oral perjury is a willful statement, under oath, of any material matter which witness knows to be false. West's Ann.Cal.Penal Code § 118. Rivera v. Lynch, 816 F.3d 1064 (9th Cir. 2016).

[END OF SUPPLEMENT]

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Footnotes

1 Springer v. Coleman, 998 F.2d 320 (5th Cir. 1993) (Texas law); State v. Rollins, 264 Kan. 466, 957 P.2d 438 (1998); Com. v. Johnson, 534 Pa. 51, 626 A.2d 514 (1993).

2 State v. Sullivan, 24 N.J. 18, 130 A.2d 610, 66 A.L.R.2d 761 (1957).

3 Franzi v. Superior Court of Arizona In and For Pima County, 139 Ariz. 556, 679 P.2d 1043 (1984); People v. Tyler, 62 A.D.2d 136, 405 N.Y.S.2d 270 (2d Dep't 1978), judgment aff'd, 46 N.Y.2d 251, 413 N.Y.S.2d 295, 385 N.E.2d 1224 (1978).

4 Morel v. Napolitano, 64 A.3d 1176, 292 Ed. Law Rep. 968 (R.I. 2013).

5 Ex parte Napper, 322 S.W.3d 202 (Tex. Crim. App. 2010).

6 State v. Bisbee, 165 N.H. 61, 69 A.3d 95 (2013), opinion corrected, 2013 WL 5539158 (N.H. 2013).

7 18 U.S.C.A. § 1621.

[8] U.S. v. Parker, 716 F.3d 999 (7th Cir. 2013), cert. denied, 134 S. Ct. 532 (2013); U.S. v. Petrovic, 701 F.3d 849 (8th Cir. 2012); U.S. v. Flonnory, 630 F.3d 1280 (10th Cir. 2011); Reyes-Reyes v. Toledo-Davila, 860 F. Supp. 2d 152 (D.P.R. 2012); Rimkus Consulting Group, Inc. v. Cammarata, 688 F. Supp. 2d 598 (S.D. Tex. 2010).

[9] Duncan v. Board of Disciplinary Appeals, 898 S.W.2d 759 (Tex. 1995).

[10] Fed. R. Crim. P. 11(b)(1)(A).

[11] Model Penal Code § 241.1(1).

[12] U.S. v. Holland, 22 F.3d 1040 (11th Cir. 1994).

[13] Martinez v. State, 91 S.W.3d 331 (Tex. Crim. App. 2002).

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60A Am. Jur. 2d Perjury § 2

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I. In General

§ 2. False swearing as separate offense

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 1, 2

Although the terms "false swearing" and "perjury" are often used interchangeably, in the strict legal sense, there is a definite difference between them.[1] At common law, false swearing is a separate, indictable offense[2] as may also be true by statute,[3] the principal distinguishing factor being that the false oath in perjury must be made in a judicial proceeding whereas in false swearing, it need not be made in such a proceeding.[4] False swearing differs from perjury in the first degree because that misdemeanor does not require proof that the false statement was made in an official proceeding.[5] Indeed, a false swearing statute is applicable not only to statements made in official proceedings but also applies to statements made in nonadversarial settings.[6]

Definition:

"False swearing" is defined as knowingly and intentionally giving a false statement under oath,[7] swearing corruptly,[8] or willfully and knowingly deposing falsely in a sworn statement concerning some fact before an officer authorized to administer an oath.[9]

The essential elements of false swearing consist in: (1) willfully, knowingly, and falsely swearing under oath or affirmation; (2) upon a matter as to which a party could legally be sworn; and (3) on oath administered by a person legally authorized to administer.[10]

While perjury can be based only on an oath required by law, in false swearing, the oath may be made to a voluntary statement or affidavit,[11] and it is not necessary that the purpose of the oath was to influence or mislead anyone.[12] In addition, although perjury requires that the false statement be material,[13] false swearing does not.[14]

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Observation:

A person swearing falsely to a material fact cannot defend him- or herself on the ground that the case did not ultimately rest on the fact to which he or she swore.[15]

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Footnotes

1 State v. Crowder, 146 W. Va. 810, 123 S.E.2d 42 (1961); Nimmo v. State, 603 P.2d 386 (Wyo. 1979).

2 State v. Coleman, 117 La. 973, 42 So. 471 (1906); Nimmo v. State, 603 P.2d 386 (Wyo. 1979).

3 Com. v. Stallard, 958 S.W.2d 21 (Ky. 1997); State ex rel. Porter v. Recht, 211 W. Va. 396, 566 S.E.2d 283 (2002).

4 State v. Coleman, 117 La. 973, 42 So. 471 (1906); Nimmo v. State, 603 P.2d 386 (Wyo. 1979).

5 Com. v. Stallard, 958 S.W.2d 21 (Ky. 1997).

6 In re Recall of Pearsall-Stipek, 141 Wash. 2d 756, 10 P.3d 1034 (2000).

7 Schoenfeld v. State, 56 Tex. Crim. 103, 119 S.W. 101 (1909); Nimmo v. State, 603 P.2d 386 (Wyo. 1979).

8 State v. Coleman, 117 La. 973, 42 So. 471 (1906).

9 Schoenfeld v. State, 56 Tex. Crim. 103, 119 S.W. 101 (1909).

10 Spillers v. State, 299 Ga. App. 854, 683 S.E.2d 903 (2009).

11 Pierce v. Creecy, 210 U.S. 387, 28 S. Ct. 714, 52 L. Ed. 1113 (1908).

12 Gammage v. State, 119 Ga. 380, 46 S.E. 409 (1904).

13 § 24.

14 Com. v. Stallard, 958 S.W.2d 21 (Ky. 1997); State ex rel. Porter v. Recht, 211 W. Va. 396, 566 S.E.2d 283 (2002).

15 People v. Young, 220 A.D.2d 872, 632 N.Y.S.2d 668 (3d Dep't 1995).

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§ 3. Degrees of perjury

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 1, 2

Various degrees of perjury are recognized,[1] and the offense of second-degree perjury may be included in the charge of first-degree perjury.[2] The element of materiality, or the necessity of relating the false statement to the subject of the proceeding in which it is made, may distinguish the degrees of the offense.[3]

Practice Tip:

Whenever a verdict in different degrees would be permissible on the evidence, the trial court must charge alternative degrees of the crime, giving the jury a choice between them.[4]

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Footnotes

1 Springer v. Coleman, 998 F.2d 320 (5th Cir. 1993); State v. Anderson, 695 So. 2d 309 (Fla. 1997).

2 State v. Hutchinson, 4 Utah 2d 404, 295 P.2d 345 (1956).

3 People v. Tyler, 62 A.D.2d 136, 405 N.Y.S.2d 270 (2d Dep't 1978), judgment aff'd, 46 N.Y.2d 251, 413 N.Y.S.2d 295, 385 N.E.2d 1224 (1978).

4 People v. Clemente, 285 A.D. 258, 136 N.Y.S.2d 202, 62 A.L.R.2d 1009 (1st Dep't 1954), order aff'd, 309 N.Y. 890, 131 N.E.2d 294 (1955).

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§ 4. Validity of perjury statute

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 2

A perjury statute which provides that a person is guilty of perjury if he or she makes a false sworn statement in regard to a material issue, believing that the statement is false, is constitutionally valid. It is not vague, since it gives a person of ordinary intelligence the opportunity to know that false statements are proscribed when one is under oath, nor is it overbroad since a separate oath requirement indicates that the proceeding in which the sworn testimony is taken must be an official proceeding, thereby avoiding the regulation of constitutionally protected speech.[1]

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Footnotes

[1] Franzi v. Superior Court of Arizona In and For Pima County, 139 Ariz. 556, 679 P.2d 1043 (1984); Mitchell v. State, 608 S.W.2d 226 (Tex. Crim. App. 1980) (stating that the use of the word "material" in a perjury statute does not render the statute unconstitutionally vague).

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§ 5. Validity of perjury statute—Federal statutes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 2

The general federal perjury statute,[1] which is narrowly drawn to punish specific conduct that infringes a substantial government interest in protecting the judicial process, is constitutionally valid since it establishes a clear and ascertainable standard of guilt and punishes only those who are found to willfully state or subscribe any material matter that they do not believe to be true.[2]

The elimination of the two-witness rule[3] from the federal false-declarations statute[4] does not render the statute unconstitutional since the rule is not one of constitutional dimension.[5] Moreover, the words "substantially affected the proceeding" are neither ambiguous nor vague since they set forth a reasonable test that can be articulated.[6]

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Footnotes

1 18 U.S.C.A. § 1621.

2 U.S. v. Masters, 484 F.2d 1251 (10th Cir. 1973).

3 § 66.

4 18 U.S.C.A. § 1623, which provides that proof beyond a reasonable doubt is sufficient for conviction, and it may not be necessary that such proof be made by any particular number of witnesses.

5 U.S. v. Lee, 509 F.2d 645 (2d Cir. 1975); U.S. v. Isaacs, 493 F.2d 1124 (7th Cir. 1974) (rejected on other grounds by, U.S. v. Gimbel, 830 F.2d 621 (7th Cir. 1987)).

6 U.S. v. Denison, 508 F. Supp. 659 (M.D. La. 1981), judgment aff'd, 663 F.2d 611, 65 A.L.R. Fed. 165 (5th Cir. 1981).

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§ 6. Sentence or punishment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 41

West's Key Number Digest, Sentencing and Punishment 113, 1502

A.L.R. Library

Construction and application of sec. 2J1.3 of United States Sentencing Guidelines (U.S.S.G. sec. 2J1.3), pertaining to sentencing for perjury, subornation of perjury, witness bribery, and departures therefrom, 130 A.L.R. Fed. 269

Perjury, which was not originally punishable as a crime, is now a crime punishable in the courts, and the punishment is generally prescribed by statute.[1] Thus, the general federal perjury statute provides that a person found guilty of perjury is subject to a fine or imprisonment or both.[2] In addition, perjury may be punishable as contempt of court.[3]

Although ordinarily, in a perjury prosecution, a single punishment for a single lie suffices, nevertheless, multiple sentences may be imposed where it is clear that each question posed to the defendant sought information concerning, and the proof of each falsehood necessitated establishment of, different facts.[4] In other words, an individual may be sentenced on separate counts of perjury as long as those counts state separate offenses.[5]

Practice Tip:

A district court does not clearly err in finding that the prosecution witness did not commit perjury such as to entitle the defendants to either a judgment of acquittal or a new trial where each instance of the witness's allegedly perjurious testimony merely differed from either another witness's testimony, his or her own prior testimony, or his or her own prior out-of-court statements, presenting a question of credibility for the jury.[6]

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Footnotes

1 DeMan v. State, 677 P.2d 903 (Alaska Ct. App. 1984); Com. v. D'Amour, 428 Mass. 725, 704 N.E.2d 1166 (1999) (statutory maximum of 20 years).

2 18 U.S.C.A. § 1621.

3 Am. Jur. 2d, Contempt § 81.

4 U.S. v. Doulin, 538 F.2d 466 (2d Cir. 1976).

5 U.S. v. Lazaros, 480 F.2d 174 (6th Cir. 1973); DeMan v. State, 677 P.2d 903 (Alaska Ct. App. 1984).

6 U.S. v. Bruno, 83 Fed. Appx. 361 (2d Cir. 2003).

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§ 7. Civil liability for perjury

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West's Key Number Digest

West's Key Number Digest, Perjury 16

A.L.R. Library

Testimony of witness as basis of civil action for damages, 54 A.L.R.2d 1298

Civil liability of witness in action under 42 U.S.C.A. sec. 1983 for deprivation of civil rights, based on testimony given at pretrial criminal proceeding, 94 A.L.R. Fed. 892

As a general rule, no civil action lies for damages resulting from false statements under oath constituting perjury[1] or from subornation of false testimony.[2] Thus, no action for damages lies for false testimony in a civil suit whereby the litigant fails to recover a judgment, or a judgment is rendered against him or her.[3]

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Footnotes

1 Shearin v. E.F. Hutton Group, Inc., 652 A.2d 578 (Del. Ch. 1994); Stolte v. Blackstone, 213 Neb. 113, 328 N.W.2d 462 (1982).
Maine is the only state that recognizes a civil action for perjury; the party who called the perjuring witness in the original trial may not recover under the perjury statute, which limits recovery to adverse parties. Spickler v. Greenberg, 644 A.2d 469 (Me. 1994).
As to protection, by an absolute privilege, of testimony given in a judicial proceeding, see Am. Jur. 2d, Libel and Slander § 292.

2 Shearin v. E.F. Hutton Group, Inc., 652 A.2d 578 (Del. Ch. 1994); Brewer v. Carolina Coach Co., 253 N.C. 257, 116 S.E.2d 725 (1960).

[3] Godette v. Gaskill, 151 N.C. 52, 65 S.E. 612 (1909); Horlock v. Horlock, 614 S.W.2d 478 (Tex. Civ. App. Houston 14th Dist. 1981), writ refused n.r.e., (July 22, 1981).

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§ 8. Civil liability for perjury—Liability for perjury in fraudulent scheme

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 16

Although the general rule is that no civil action lies for damages resulting from perjury,[1] an exception exists which permits an action where the perjury is merely a part of a fraudulent scheme greater in scope than the issues determined in the prior proceeding.[2] Thus, where a plaintiff is able to establish all the necessary elements of fraud and deceit, he or she may have a day in court to seek redress for such alleged wrongful conduct as his or her cause of action is based on more than a mere giving of perjured testimony.[3]

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Footnotes

1 § 7.

2 Alexander v. City of Peekskill, 80 A.D.2d 626, 436 N.Y.S.2d 327 (2d Dep't 1981).

3 Frist v. Gallant, 240 F. Supp. 827 (W.D. S.C. 1965).

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§ 9. Civil liability for perjury—Liability for conspiracy to give or procure false testimony

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 16

A.L.R. Library

Actionability of conspiracy to give or to procure false testimony or other evidence, 31 A.L.R.3d 1423

Although generally, no civil action lies for damages resulting from a conspiracy to give, or to procure the giving of, false testimony,[1] nevertheless, an action may lie where the perjury was a means to, or a step in, the accomplishment of some larger actionable conspiracy.[2] Accordingly, a conspiracy for the purpose of committing perjury is an offense against the public only, but a conspiracy for the purpose of injuring another, if it results in damage to the other, is an offense for which there may be a recovery; thus, the public policy of forbidding civil redress for damage caused by perjured testimony should not be imposed to protect those who conspire to injure another's reputation or profession through the means of perjured testimony.[3]

Observation:

Witnesses may not be held civilly liable in a petitioner's action for conspiracy to commit perjury and perjury where the alleged perjury occurred in open court during testimony provided by the witnesses in a prior judicial proceeding, and the testimony is related to the prior judicial proceeding.[4]

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Footnotes

1 W. G. Platts, Inc. v. Platts, 73 Wash. 2d 434, 438 P.2d 867, 31 A.L.R.3d 1413 (1968); Radue v. Dill, 74 Wis. 2d 239, 246 N.W.2d 507 (1976).

2 Frist v. Gallant, 240 F. Supp. 827 (W.D. S.C. 1965).

3 Radue v. Dill, 74 Wis. 2d 239, 246 N.W.2d 507 (1976).

4 Morley v. Gory, 2002 PA Super 421, 814 A.2d 762 (2002).

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II. Elements of Perjury

A. In General

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West's Key Number Digest, Perjury 1 to 3, 5 to 10

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A.L.R. Index, Perjury
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II. Elements of Perjury

A. In General

§ 10. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 1 to 3

The essential elements of perjury consist of an oath, authorized or required by law, before a competent person or tribunal;[1] a false statement[2] of a material fact;[3] and knowledge of the falsity.[4] Also, the statement must have been made in a proceeding, or in relation to a matter, within the jurisdiction of the tribunal or officer before whom the proceeding was held or by whom the matter was considered.[5] The elements of the crime of perjury do not include the requirement that the untrue testimony must successfully deceive the trier of fact.[6]

Under federal law,[7] the elements that must be proved to establish a case for perjury are an oath in a case in which the law authorizes an oath to be administered,[8] before a competent tribunal, officer, or person,[9] and a statement, which the declarant does not believe to be true,[10] of a material matter.[11]

If the statement is made before a grand jury, it must be as to a matter that the grand jury has the power to investigate.[12] Fraud is not one of the essential ingredients of the offense.[13]

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Footnotes

1 §§ 11 to 13.

2 §§ 18 to 23.

3 §§ 24 to 27.

4 § 22.

5 §§ 14 to 17.

6 State v. Jarrett, 304 S.W.3d 151 (Mo. Ct. App. S.D. 2009).

7 18 U.S.C.A. § 1621.

8 § 11.

9 § 13.

10 §§ 18 to 23.

11 §§ 24 to 27.

12 § 33.

13 Bridges v. U.S., 346 U.S. 209, 73 S. Ct. 1055, 97 L. Ed. 1557 (1953).

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60A Am. Jur. 2d Perjury § 11

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II. Elements of Perjury

A. In General

§ 11. Oath or affirmation required or authorized by law

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 2, 5 to 8

An essential element of perjury is that the accused took an oath,[1] or made an affirmation, authorized or required by law, or having some effect in law.[2]

A notary public's false certification of a deed of trust does not constitute perjury; the acknowledgment performed by the notary public is not an oath or affirmation, which constitutes perjury when given falsely.[3]

The view has been taken that the oath is "required by law" if the statement must be sworn to before it can be used for the legal purpose intended.[4] There is authority holding, however, that an oath is "required by law" only if a specific statute explicitly requires an oath to be administered.[5] In any event, perjury is not committed by falsifying a voluntary, useless, or extrajudicial oath.[6]

The federal perjury statutes[7] make an essential element of perjury an oath or affirmation[8] authorized or required by law.[9]

The phrase "a law of the United States," as used in the general federal perjury statute[10] respecting cases "in which a law of the United States authorizes an oath to be administered," is not limited to statutes but includes rules and regulations that have been lawfully authorized and have a clear legislative base.[11]

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Footnotes

1 Grovner v. State, 317 Ga. App. 623, 732 S.E.2d 282 (2012); State v. Carter, 618 N.W.2d 374 (Iowa 2000); State v. Mertz, 801 N.W.2d 219 (Minn. Ct. App. 2011); Hardy v. State, 187 S.W.3d 678 (Tex. App. Houston 14th Dist. 2006), petition for discretionary review granted, (Sept. 13, 2006) and judgment rev'd on other grounds, 213 S.W.3d 916 (Tex. Crim. App. 2007).

[2] Com. v. Russo, 177 Pa. Super. 470, 111 A.2d 359 (1955); State v. Wade, 174 W. Va. 381, 327 S.E.2d 142 (1985).

[3] Stiley v. Block, 130 Wash. 2d 486, 925 P.2d 194 (1996).

[4] People v. Watson, 85 Ill. App. 3d 649, 40 Ill. Dec. 781, 406 N.E.2d 1148 (4th Dist. 1980).

[5] State v. Douglas, 222 Neb. 833, 388 N.W.2d 801 (1986); White v. State, 102 Nev. 153, 717 P.2d 45 (1986).

[6] People v. Watson, 85 Ill. App. 3d 649, 40 Ill. Dec. 781, 406 N.E.2d 1148 (4th Dist. 1980).

[7] 18 U.S.C.A. §§ 1621 to 1623.

[8] U.S. v. Stotts, 113 F.3d 493 (4th Cir. 1997); U.S. v. Key, 13 Fed. Appx. 461 (8th Cir. 2001); U.S. v. Singh, 291 F.3d 756 (11th Cir. 2002).

[9] U.S. v. Arias, 575 F.2d 253, 3 Fed. R. Evid. Serv. 184 (9th Cir. 1978); U.S. v. Molinares, 700 F.2d 647 (11th Cir. 1983).

[10] 18 U.S.C.A. § 1621.

[11] U.S. v. Hvass, 355 U.S. 570, 78 S. Ct. 501, 2 L. Ed. 2d 496 (1958).

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60A Am. Jur. 2d Perjury § 12

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II. Elements of Perjury

A. In General

§ 12. Oath or affirmation required or authorized by law—Form of oath

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 10

A.L.R. Library

Perjury conviction as affected by notary's nonobservance of formalities for administration of oath to affiant, 80 A.L.R.3d 278

The oath, which is a necessary basis for a prosecution for perjury, must be solemnly administered by a duly authorized officer,[1] and it is immaterial in what form it is given[2] provided the affiant accepts the oath as binding on his or her conscience;[3] an irregularity is no defense.[4] In other words, there is a valid oath sufficient to form the basis of a charge of perjury when there is some unequivocal and present act, in the presence of an officer authorized to administer the oath, whereby the affiant consciously takes on him- or herself the obligation of the oath.[5] Indeed, the mere signing of an affidavit before an officer does not constitute the act necessary to constitute an oath.[6] Perjury does not require evidence that the affiant was present before a notary public at the time the oath was executed in addition to a signed jurat stating that the document was sworn to and subscribed before a notary.[7]

The oath may be oral or written,[8] and it may be administered before or after the making of the statement provided that the affiant willfully and corruptly intends the oath to verify the false statement already made or to support a factual disclosure to be given later.[9] Moreover, the failure of an affiant to hold up his or her right hand during the administration of the oath does not preclude a finding that an oath was actually administered and taken.[10]

If the form of an oath is prescribed by statute, the statute must be substantially complied with;[11] accordingly, an oath administered to a witness appearing before a grand jury, which is materially different in both form and substance from the prescribed statutory oath, is not a lawful one and cannot properly be the basis for a perjury prosecution.[12]

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Footnotes

1 § 13.

2 People v. Brown, 125 Cal. App. 2d 83, 269 P.2d 918 (4th Dist. 1954); State v. Lewis, 85 Wash. 2d 769, 539 P.2d 677, 80 A.L.R.3d 273 (1975).

3 State v. Parker, 81 Idaho 51, 336 P.2d 318 (1959); State v. Carter, 618 N.W.2d 374 (Iowa 2000); State v. Blaisdell, 253 A.2d 341 (Me. 1969).

4 Neely v. State Dept. of Public Safety, Drivers License Division, 308 So. 2d 880 (La. Ct. App. 2d Cir. 1975); State v. Lewis, 85 Wash. 2d 769, 539 P.2d 677, 80 A.L.R.3d 273 (1975).

5 State v. Snyder, 304 So. 2d 334 (La. 1974); People v. Lieberman, 57 Misc. 2d 1070, 294 N.Y.S.2d 117 (Sup 1968).

6 White v. State, 102 Nev. 153, 717 P.2d 45 (1986).

7 Hardy v. State, 213 S.W.3d 916 (Tex. Crim. App. 2007).

8 Neely v. State Dept. of Public Safety, Drivers License Division, 308 So. 2d 880 (La. Ct. App. 2d Cir. 1975); State v. Carr, 319 Or. 408, 877 P.2d 1192 (1994).

9 Sevin v. State, 478 So. 2d 521 (Fla. 2d DCA 1985); State v. Blaisdell, 253 A.2d 341 (Me. 1969).

10 People v. Walker, 247 Cal. App. 2d 554, 55 Cal. Rptr. 726 (3d Dist. 1967).

11 State v. Williams, 181 Ga. App. 204, 351 S.E.2d 727 (1986); State v. Carter, 618 N.W.2d 374 (Iowa 2000).

12 Kirkland v. State, 140 Ga. App. 197, 230 S.E.2d 347 (1976).

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60A Am. Jur. 2d Perjury § 13

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II. Elements of Perjury

A. In General

§ 13. Oath or affirmation required or authorized by law—Person authorized to administer oath

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 9(.5), 9(2)

In order to support a perjury charge, the oath under which false testimony is given must have been administered by a person having lawful authority to do so,[1] and express statutory authority to administer oaths may be required.[2] Where the oath is administered by a person having no legal authority to administer it, as by a person acting merely in a private capacity or having authority to administer a certain oath but not the one in question, there can be no conviction for perjury.[3]

Observation:

An oath administered in open court by one performing the duties of a clerk or other court officer, under the direction of the court, is an oath administered by the court so that false testimony under the oath constitutes perjury.[4] In such a situation, the oath derives its sanction and validity from the circumstance that it is duly administered in open court, with the approval and under the control of the court.[5]

Although there is authority holding that perjury may be predicated on a false statement made under an oath administered by a de facto officer,[6] nevertheless, it is generally considered immaterial whether the person administering the oath is an officer de jure or de facto if his or her act takes place in the court's presence and by its sanction.[7]

Where perjury is committed in violation of a law of the United States, the officer administering the oath must have been authorized under federal law to so administer it, and proof of the identity of the oath giver may be required[8] unless the oath was administered in open court in the presence of a judge.[9]

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Practice Tip:

The federal false-declarations statute,[10] unlike the general federal perjury statute,[11] does not require proof that the person who administered the oath was competent or authorized to administer it; it merely requires that the government prove that the maker of a knowingly false declaration before a court be under oath at the time of the statement.[12]

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Footnotes

1 Hsu v. U. S., 392 A.2d 972 (D.C. 1978); State v. Carter, 618 N.W.2d 374 (Iowa 2000).

2 State v. Flamer, 54 Or. App. 17, 633 P.2d 860 (1981).

3 Bogle v. State, 477 So. 2d 507 (Ala. Crim. App. 1985); State v. Flamer, 54 Or. App. 17, 633 P.2d 860 (1981).

4 State v. Townley, 67 Ohio St. 21, 65 N.E. 149 (1902).

5 Beckley v. State, 443 P.2d 51 (Alaska 1968).

6 People v. McLeod, 30 Cal. App. 435, 158 P. 506 (2d Dist. 1916); Coleman v. State ex rel. King, 134 Fla. 802, 184 So. 334 (1938).

7 State v. Townley, 67 Ohio St. 21, 65 N.E. 149 (1902).

8 U.S. v. Molinares, 700 F.2d 647 (11th Cir. 1983).

9 U.S. v. White, 364 F.2d 486 (4th Cir. 1966).

10 18 U.S.C.A. § 1623.

11 18 U.S.C.A. § 1621.

12 U.S. v. Molinares, 700 F.2d 647 (11th Cir. 1983).

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60A Am. Jur. 2d Perjury II B Refs.

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II. Elements of Perjury

B. Jurisdiction

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Perjury 2, 5 to 9(1)

A.L.R. Library

A.L.R. Index, Perjury
West's A.L.R. Digest, Perjury 2, 5 to 9(1)

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II. Elements of Perjury

B. Jurisdiction

§ 14. Generally; irregularities and defects

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 9(.5), 9(1)

A.L.R. Library

Offense of perjury as affected by lack of jurisdiction by court or governmental body before which false testimony was given, 36 A.L.R.3d 1038

Generally, perjury cannot be charged with respect to false testimony in an action or proceeding before a court that has no jurisdiction over the person.[1] Moreover, the false statement must be made in a proceeding, or in relation to a matter, within the jurisdiction of the tribunal or officer before whom the proceeding is held or by whom the matter is considered.[2]

Practice Tip:

Where a court has jurisdiction over the subject matter, false testimony before the court has been held to constitute perjury notwithstanding an ultimate determination that the proceeding is otherwise defective.[3]

Although perjury cannot be assigned on false testimony given in the course of a trial where the court lacks personal jurisdiction of the defendant or subject matter jurisdiction, material false testimony given in the course of proceedings that are merely erroneous or voidable constitutes perjury, even if the irregularities or defects require a reversal of the cause on

appeal,[4] provided the court has jurisdiction to render judgment on the merits.[5] Thus, where a defect renders the proceeding voidable only, and such proceeding is amendable, or where the defects are waived by the parties and the cause is heard on the merits, perjury may be charged.[6]

Under federal law, defects developed in the procedure, sufficient to invalidate a judgment on review, do not make a subsequent conviction for perjury in the former trial impossible where the court in the former trial had jurisdiction to render judgment on the merits.[7]

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Footnotes

1 Malone v. State, 41 Ala. App. 230, 132 So. 2d 749 (1961); State v. Wolfe, 203 So. 2d 338, 36 A.L.R.3d 1034 (Fla. 1st DCA 1967).

2 Malone v. State, 41 Ala. App. 230, 132 So. 2d 749 (1961); State v. Wolfe, 203 So. 2d 338, 36 A.L.R.3d 1034 (Fla. 1st DCA 1967).

3 State v. Dahlin, 1998 MT 299, 292 Mont. 49, 971 P.2d 763 (1998).

4 State v. Wolfe, 203 So. 2d 338, 36 A.L.R.3d 1034 (Fla. 1st DCA 1967); Com. v. Beddick, 180 Pa. Super. 221, 119 A.2d 590 (1956).

5 State v. Wolfe, 203 So. 2d 338, 36 A.L.R.3d 1034 (Fla. 1st DCA 1967).

6 State v. Wolfe, 203 So. 2d 338, 36 A.L.R.3d 1034 (Fla. 1st DCA 1967); Com. v. Beddick, 180 Pa. Super. 221, 119 A.2d 590 (1956).

7 U.S. v. Williams, 341 U.S. 58, 71 S. Ct. 595, 95 L. Ed. 747 (1951); United States v. Remington, 208 F.2d 567 (2d Cir. 1953).

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60A Am. Jur. 2d Perjury § 15

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II. Elements of Perjury

B. Jurisdiction

§ 15. Generally; irregularities and defects—Lack of jurisdiction arising from facts outside record

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 9(.5)

False testimony given on a record showing jurisdiction is perjury even though facts later appear defeating jurisdiction since the effects of a lack of jurisdiction to take cognizance of a case and a lack of jurisdiction to proceed to judgment, which often arises from some matter outside the record appearing only after investigation, are not the same. A court without jurisdiction to proceed to judgment may have jurisdiction to take cognizance of a case in the first instance until the facts showing lack of jurisdiction appear.[1] To hold otherwise would have the incongruous result of permitting a party to perjure him- or herself as to matters establishing jurisdiction and then escape the consequences of his or her perjury because the facts giving rise to jurisdiction are false.[2]

Under federal law,[3] defects developed outside the record, sufficient to invalidate judgment on review, do not make a subsequent conviction for perjury committed in the former trial impossible where the court in the former trial had jurisdiction to render judgment on the merits.[4]

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Footnotes

1 State v. Forichette, 279 Minn. 76, 156 N.W.2d 93, 34 A.L.R.3d 399 (1968); State v. Buchanan, 79 Wash. 2d 740, 489 P.2d 744 (1971).

2 State v. Buchanan, 79 Wash. 2d 740, 489 P.2d 744 (1971).

3 18 U.S.C.A. § 1621.

4 U.S. v. Williams, 341 U.S. 58, 71 S. Ct. 595, 95 L. Ed. 747 (1951).

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60A Am. Jur. 2d Perjury § 16

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II. Elements of Perjury

B. Jurisdiction

§ 16. Grand jury proceedings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 2, 6, 9(1)

In order to constitute perjury, false testimony made by a witness before a grand jury must be material to a matter that the grand jury has the power to investigate.[1] False declarations that are material only to an investigation beyond the grand jury's jurisdiction or authority, or to offenses outside its authority to indict, may not be the basis for a charge of perjury.[2] If, however, the prosecution proves that the statement was material to the grand jury's inquiry, as it must in order to prove the crime of perjury, it will also have proved that the grand jury was within its authority to ask the question. Under this view, the issue of jurisdiction will be litigated as one aspect of materiality.[3]

Practice Tip:

Where jurisdiction is not considered an element of the offense but only a factor in determining the materiality of the accused's false statements, a county grand jury's lack of jurisdiction to make an inquiry may not be raised as a defense to a charge of perjury since the proper method is to challenge the propriety of the grand jury's question before the response is given. The witness may decline to answer the objectionable question and risk prosecution for contempt, or he or she may answer honestly, but he or she cannot, with impunity, knowingly and willfully answer with a falsehood. Even so, a false answer to a question outside the grand jury's jurisdiction or authority is not thereby made a perjury since the prosecution must still bear the burden of proving that the statement is material to offenses within the grand jury's authority to indict.[4]

Under federal law,[5] although a perjury charge may be predicated on a false declaration before a grand jury,[6] the declaration must relate to a matter that the grand jury has the power to investigate.[7] False declarations that are material only to an investigation beyond the grand jury's jurisdiction or authority do not constitute perjury.[8]

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However, the fact that the grand jury is later found to have been constituted in violation of a federal statute does not vitiate the oath or negate the alleged falseness of the testimony.[9]

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Footnotes

1 People v. Tyler, 62 A.D.2d 136, 405 N.Y.S.2d 270 (2d Dep't 1978), judgment aff'd, 46 N.Y.2d 251, 413 N.Y.S.2d 295, 385 N.E.2d 1224 (1978); Bennett v. District Court of Tulsa County, 81 Okla. Crim. 351, 162 P.2d 561 (1945).

2 Franzi v. Superior Court of Arizona In and For Pima County, 139 Ariz. 556, 679 P.2d 1043 (1984).

3 Franzi v. Superior Court of Arizona In and For Pima County, 139 Ariz. 556, 679 P.2d 1043 (1984).
As to perjury in grand jury proceedings, generally, see § 33.

4 Franzi v. Superior Court of Arizona In and For Pima County, 139 Ariz. 556, 679 P.2d 1043 (1984).

5 18 U.S.C.A. §§ 1621 to 1623.

6 § 33.

7 U.S. v. Swainson, 548 F.2d 657 (6th Cir. 1977).

8 U.S. v. Jacobs, 543 F.2d 18 (7th Cir. 1976); Brown v. U.S., 245 F.2d 549 (8th Cir. 1957).

9 U.S. v. Caron, 551 F. Supp. 662 (E.D. Va. 1982), judgment aff'd, 722 F.2d 739 (4th Cir. 1983).

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§ 17. Other particular proceedings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 5 to 8

False testimony before a congressional committee does not constitute perjury unless the committee is a competent tribunal.[1] Likewise, a perjury conviction cannot be based on false testimony before a governmental commission that is not legally constituted.[2]

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Footnotes

1 § 32.

2 Com. v. Giles, 353 Mass. 1, 228 N.E.2d 70 (1967); State v. Schoonover, 146 W. Va. 1036, 124 S.E.2d 340 (1962).

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C. False Statement or Testimony

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Research References

West's Key Number Digest

West's Key Number Digest, Perjury 12

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A.L.R. Index, Perjury
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60A Am. Jur. 2d Perjury § 18

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II. Elements of Perjury

C. False Statement or Testimony

1. In General

§ 18. Generally; intent to falsify

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 12

A necessary ingredient of the offense of perjury is a false statement or testimony[1] which the speaker believes to be false.[2] Indeed, mere inconsistencies in a witness's testimony and contradictory testimony from other witnesses are not sufficient to establish perjury.[3] Neither does the fact that the witness contradicts him- or herself and changes his or her story establish perjury.[4] Accordingly, a finding of perjury does not arise because a witness provides material testimony for the first time at trial and testifies differently from the witness's grand jury testimony.[5]

The statement must be one of fact,[6] not an opinion or belief.[7] It cannot be based on interpretations of alleged agreements, either oral or written; on opinions calling for the exercise of judgment;[8] or on statements as to the legal effect of certain facts.[9] Thus, where a statement is a matter of construction or deduction from given facts, it is not a perjury even though the statement is erroneous or is not a correct construction or logical deduction from all the facts.[10]

Similarly, an essential element of perjury under federal law[11] is a false statement or testimony[12] which the witness does not believe to be true.[13]

The false statement on which a charge of perjury is based must be made with criminal intent.[14] It must be willfully[15] and deliberately given, with the intent that it be taken as true.[16] Similarly, to constitute perjury, a false affidavit must be made with the intent that it will be uttered or published as true.[17]

Observation:

Although the general federal perjury statute[18] requires specific intent to deceive and to violate one's oath, the federal false-declarations statute[19] requires that the false statement be made knowingly rather than willfully.[20]

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CUMULATIVE SUPPLEMENT

Cases:

Evidence was insufficient to support finding that defendant knowingly lied during her grand jury testimony when she stated that co-defendant, who was involved in another criminal prosecution, "never" told her what to say to other people, despite defendant's letter instructing co-defendant to tamper with witness, as required for perjury and obstruction of justice convictions; questions were probing in-person jail conversations between defendant and co-defendant, and there was no indication that witness tampering was discussed during those visits. 18 U.S.C.A. §§ 1503(a), 1623. United States v. Chujoy, 207 F. Supp. 3d 626 (W.D. Va. 2016).

[END OF SUPPLEMENT]

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Footnotes

[1] McGill v. Superior Court, 195 Cal. App. 4th 1454, 128 Cal. Rptr. 3d 120 (4th Dist. 2011); People v. Shelton, 401 Ill. App. 3d 564, 340 Ill. Dec. 840, 929 N.E.2d 144 (1st Dist. 2010).

[2] Franzi v. Superior Court of Arizona In and For Pima County, 139 Ariz. 556, 679 P.2d 1043 (1984).

[3] Drain v. Woods, 902 F. Supp. 2d 1006 (E.D. Mich. 2012), certificate of appealability granted, 2012 WL 6114968 (E.D. Mich. 2012); Better Bags, Inc. v. Illinois Tool Works, Inc., 939 F. Supp. 2d 737 (S.D. Tex. 2013).

[4] Drain v. Woods, 902 F. Supp. 2d 1006 (E.D. Mich. 2012), certificate of appealability granted, 2012 WL 6114968 (E.D. Mich. 2012).

[5] U.S. v. Adan, 913 F. Supp. 2d 555 (M.D. Tenn. 2012).

[6] State v. Hawkins, 620 N.W.2d 256 (Iowa 2000); In re Disciplinary Proceedings Against Huddleston, 137 Wash. 2d 560, 974 P.2d 325 (1999).

[7] § 19.

[8] Schoenfeld v. State, 56 Tex. Crim. 103, 119 S.W. 101 (1909).

[9] People v. Drake, 63 Ill. App. 3d 633, 20 Ill. Dec. 544, 380 N.E.2d 522 (4th Dist. 1978); In re Disciplinary Proceedings Against Huddleston, 137 Wash. 2d 560, 974 P.2d 325 (1999).

[10] People v. Smith, 76 Ill. App. 3d 191, 30 Ill. Dec. 27, 392 N.E.2d 682 (2d Dist. 1979).

[11] 18 U.S.C.A. §§ 1621 to 1623.

[12] U.S. v. Espinoza, 684 F.3d 766 (8th Cir. 2012), cert. denied, 133 S. Ct. 589, 184 L. Ed. 2d 386 (2012); U.S. v. Quarrell, 310 F.3d 664, 184 A.L.R. Fed. 625 (10th Cir. 2002); U.S. v. Singh, 291 F.3d 756 (11th Cir. 2002); U.S. v. Cicalese, 863 F. Supp. 2d 231 (E.D. N.Y. 2012); U.S. v. Healey, 860 F. Supp. 2d 262 (S.D. N.Y. 2012).

[13] Bronston v. U.S., 409 U.S. 352, 93 S. Ct. 595, 34 L. Ed. 2d 568 (1973); U.S. v. Forrest, 623 F.2d 1107 (5th Cir. 1980).

[14] Margo v. Weiss, 213 F.3d 55, 46 Fed. R. Serv. 3d 870 (2d Cir. 2000); U.S. v. Espinoza, 684 F.3d 766 (8th Cir. 2012), cert. denied, 133 S. Ct. 589, 184 L. Ed. 2d 386 (2012); U.S. v. Healey, 860 F. Supp. 2d 262 (S.D. N.Y. 2012).

15 U.S. v. Titlbach, 300 F.3d 919 (8th Cir. 2002); State v. Feagle, 600 So. 2d 1236 (Fla. 1st DCA 1992).

16 U.S. v. Goguen, 723 F.2d 1012, 14 Fed. R. Evid. Serv. 1315 (1st Cir. 1983); U.S. v. Watson, 623 F.2d 1198, 6 Fed. R. Evid. Serv. 263 (7th Cir. 1980).

17 § 34.

18 18 U.S.C.A. § 1621.

19 18 U.S.C.A. § 1623.

20 U.S. v. Goguen, 723 F.2d 1012, 14 Fed. R. Evid. Serv. 1315 (1st Cir. 1983); U.S. v. Watson, 623 F.2d 1198, 6 Fed. R. Evid. Serv. 263 (7th Cir. 1980).

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II. Elements of Perjury

C. False Statement or Testimony

1. In General

§ 19. Statements of opinion or belief

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 12

A.L.R. Library

Statement of belief or opinion as perjury, 66 A.L.R.2d 791

The general rule under both federal[1] and state law is that in order to support a perjury conviction, the false statement must be one of fact,[2] and not of opinion or belief,[3] even though the belief may be unfounded in fact or law, or the opinion may be erroneous.[4]

However, a statement of opinion or belief may constitute perjury where, as a matter of fact, the witness has no such opinion or belief[5] or where the existence or nonexistence of the opinion or belief is in itself a material matter of fact.[6]

CUMULATIVE SUPPLEMENT

Cases:

Personal opinions or matters of belief are not perjury, and an initially false statement can be further explained so that the statement taken as a whole is not perjury. West's F.S.A. § 837.012(1). McAlpin v. Criminal Justice Standards and Training Com'n, 155 So. 3d 416 (Fla. 1st DCA 2014).

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[END OF SUPPLEMENT]

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Footnotes

1 18 U.S.C.A. § 1621.

2 § 18.

3 State v. Hawkins, 620 N.W.2d 256 (Iowa 2000); Furda v. State, 194 Md. App. 1, 1 A.3d 528 (2010), judgment aff'd, 421 Md. 332, 26 A.3d 918 (2011), cert. denied, 132 S. Ct. 2376, 182 L. Ed. 2d 1025 (2012) (ordinarily, statements which present legal conclusions are considered opinion and cannot form the basis of a perjury conviction); In re Disciplinary Proceedings Against Huddleston, 137 Wash. 2d 560, 974 P.2d 325 (1999).

4 People v. Drake, 63 Ill. App. 3d 633, 20 Ill. Dec. 544, 380 N.E.2d 522 (4th Dist. 1978).

5 State v. Hawkins, 620 N.W.2d 256 (Iowa 2000); Brasher v. State, 715 S.W.2d 827 (Tex. App. Houston 14th Dist. 1986).

6 State v. Sullivan, 24 N.J. 18, 130 A.2d 610, 66 A.L.R.2d 761 (1957).

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C. False Statement or Testimony

1. In General

§ 20. Answers to ambiguous questions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 12

Generally, the existence of some ambiguity in a falsely answered question will not shield the respondent from a perjury or false statements prosecution.[1] However, an excessively vague or fundamentally ambiguous question may not form the predicate to a perjury or false-statement prosecution,[2] and answers associated with ambiguous questions may be insufficient as a matter of law to support a perjury conviction.[3] An answer is not a knowing false statement, as required to sustain a conviction for perjury, if the witness responds to an ambiguous question with what he or she believes to be a truthful answer.[4] Thus, precise questioning is imperative as a predicate for the offense of perjury.[5]

Observation:

The courts consider a number of factors in perjury prosecutions when assessing whether a question was fundamentally ambiguous, including: (1) the inherent vagueness, or conversely, the inherent clarity, of certain words and phrases; (2) the compound character of a question; (3) the existence of defects in syntax or grammar in a question; (4) the context of the question and answer; and (5) the defendant's own responses to allegedly ambiguous questions.[6] To be fundamentally ambiguous, so as to support the acquittal of a perjury defendant, a question must lack a meaning about which men of ordinary intellect could agree nor one which could be used with mutual understanding by a questioner and answerer unless it was defined at the time it was sought and offered as testimony; the question must be so vague that it is impossible to have intended to answer it untruthfully.[7]

A witness is not required to guess the meaning of a question posed to him or her upon peril of perjury,[8] and a person cannot be convicted of perjury for a truthful answer to a question subject to various interpretations.[9]

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Practice Tip:

The benchmark is whether the words involved, read in their immediate context, are susceptible to a reasonable interpretation other than that intended by the questioner and whether the witness' answer truthfully responds to his or her reasonable interpretation of the words.[10]

Thus, whether an answer is false may depend on how the witness understands the question[11] and on the precision of the examiner's questions.[12] If the answer given is true when the question is interpreted in accordance with the understanding of the witness, then the answer is not false, and his or her statement is not a lie.[13] Furthermore, the witness' failure to volunteer more explicit information is not perjury even though the answer may create a misleading impression.[14]

Since the essence of perjury is the witness' belief concerning the veracity of his or her statement, not his or her knowledge of the interrogator's intent, a witness who does not understand the question and gives a nonresponsive answer does not commit perjury.[15] However, if the answer to an arguably ambiguous question is sufficiently explicit to satisfy the jury beyond a reasonable doubt that the defendant knowingly made a false statement, then the statement may serve as the predicate for the offense of making a false material declaration.[16]

Observation:

When a perjury defendant claims that the question in response to which he or she allegedly gave a perjured testimony is ambiguous or misunderstood, the context of the question and answer becomes critically important.[17]

Practice Tip:

Where a defendant charged with making false statements argues that because of some ambiguity or uncertainty in the question he or she is alleged to have answered falsely, his or her understanding of the question differed from that of the government, thus making the evidence insufficient to prove an essential element of the offense, the defendant's understanding of the question is a matter for the jury to decide, subject to an exception for cases where a reasonable minded jury must have a reasonable doubt as to the existence of the essential elements of the crime charged.[18]

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Footnotes

1 U.S. v. McKenna, 327 F.3d 830, 61 Fed. R. Evid. Serv. 123 (9th Cir. 2003); Furda v. State, 421 Md. 332, 26 A.3d 918 (2011), cert. denied, 132 S. Ct. 2376, 182 L. Ed. 2d 1025 (2012).

2 U.S. v. Serafini, 167 F.3d 812 (3d Cir. 1999); U.S. v. Sarwari, 669 F.3d 401 (4th Cir. 2012); U.S. v. Farmer, 137 F.3d 1265 (10th Cir. 1998); U.S. v. Naegele, 341 B.R. 349 (D.D.C. 2006).

[3] U.S. v. Brooks, 681 F.3d 678 (5th Cir. 2012), cert. denied, 133 S. Ct. 836, 184 L. Ed. 2d 652 (2013) and cert. denied, 133 S. Ct. 837, 184 L. Ed. 2d 652 (2013) and cert. denied, 133 S. Ct. 839, 184 L. Ed. 2d 652 (2013); U.S. v. Naegele, 341 B.R. 349 (D.D.C. 2006); U.S. v. Cicalese, 863 F. Supp. 2d 231 (E.D. N.Y. 2012).

[4] U.S. v. Strohm, 671 F.3d 1173 (10th Cir. 2011).

[5] U.S. v. Bollin, 264 F.3d 391, 57 Fed. R. Evid. Serv. 429 (4th Cir. 2001); U.S. v. Naegele, 341 B.R. 349 (D.D.C. 2006); U.S. v. Hughson, 488 F. Supp. 2d 835 (D. Minn. 2007); U.S. v. Cicalese, 863 F. Supp. 2d 231 (E.D. N.Y. 2012).

[6] U.S. v. Strohm, 671 F.3d 1173 (10th Cir. 2011).

[7] U.S. v. Sarwari, 669 F.3d 401 (4th Cir. 2012); U.S. v. Brooks, 681 F.3d 678 (5th Cir. 2012), cert. denied, 133 S. Ct. 836, 184 L. Ed. 2d 652 (2013) and cert. denied, 133 S. Ct. 837, 184 L. Ed. 2d 652 (2013) and cert. denied, 133 S. Ct. 839, 184 L. Ed. 2d 652 (2013); U.S. v. Strohm, 671 F.3d 1173 (10th Cir. 2011).

[8] U.S. v. Farmer, 137 F.3d 1265 (10th Cir. 1998).

[9] People v. Barrios, 114 Ill. 2d 265, 102 Ill. Dec. 522, 500 N.E.2d 415 (1986).

[10] People v. Wills, 71 Ill. 2d 138, 15 Ill. Dec. 753, 374 N.E.2d 188 (1978).

[11] U.S. v. Cicalese, 863 F. Supp. 2d 231 (E.D. N.Y. 2012); State v. Douglas, 217 Neb. 199, 349 N.W.2d 870 (1984).

[12] People v. Toner, 55 Ill. App. 3d 688, 13 Ill. Dec. 553, 371 N.E.2d 270 (1st Dist. 1977); People v. Tyler, 62 A.D.2d 136, 405 N.Y.S.2d 270 (2d Dep't 1978), judgment aff'd, 46 N.Y.2d 251, 413 N.Y.S.2d 295, 385 N.E.2d 1224 (1978).

[13] State v. Douglas, 217 Neb. 199, 349 N.W.2d 870 (1984).

[14] State v. Douglas, 217 Neb. 199, 349 N.W.2d 870 (1984); Bell v. State, 2001 ND 188, 636 N.W.2d 438 (N.D. 2001).

[15] U.S. v. Eddy, 737 F.2d 564 (6th Cir. 1984); State v. Douglas, 217 Neb. 199, 349 N.W.2d 870 (1984).

[16] U.S. v. Thompson, 637 F.2d 267 (5th Cir. 1981).

[17] U.S. v. Farmer, 137 F.3d 1265 (10th Cir. 1998); U.S. v. Manapat, 928 F.2d 1097 (11th Cir. 1991).

[18] U.S. v. Posada Carriles, 541 F.3d 344 (5th Cir. 2008).

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II. Elements of Perjury

C. False Statement or Testimony

1. In General

§ 21. Answers as true but evasive, misleading, or unresponsive

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 12

A.L.R. Library

Incomplete, misleading, or unresponsive but literally true statement as perjury, 69 A.L.R.3d 993

Although it may be true that often the surest way to convey misinformation is to tell the strict truth,[1] a statement that is literally true cannot support a perjury conviction[2] even though it is vague,[3] unresponsive,[4] evasive,[5] or misleading.[6]

However, an answer that is responsive and false on its face does not come within a literal truth analysis, simply because the defendant can postulate unstated premises of the question that would make his or her answer literally true.[7]

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Footnotes

1 U.S. v. Dean, 55 F.3d 640 (D.C. Cir. 1995).

2 U.S. v. Castro, 704 F.3d 125 (3d Cir. 2013); U.S. v. Bollin, 264 F.3d 391, 57 Fed. R. Evid. Serv. 429 (4th Cir. 2001); U.S. v. Strohm, 671 F.3d 1173 (10th Cir. 2011); U.S. v. Naegele, 341 B.R. 349 (D.D.C. 2006); U.S. v. Forde, 740 F. Supp. 2d 406 (S.D. N.Y. 2010) (whether the answer is literally true raises a factual question to be resolved by the jury); State v. Singh, 167 Wash. App. 971, 275 P.3d 1156 (Div. 3 2012).

[3] U.S. v. Bollin, 264 F.3d 391, 57 Fed. R. Evid. Serv. 429 (4th Cir. 2001); U.S. v. Porter, 994 F.2d 470 (8th Cir. 1993).

[4] U.S. v. Strohm, 671 F.3d 1173 (10th Cir. 2011); U.S. v. Shotts, 145 F.3d 1289 (11th Cir. 1998).

[5] U.S. v. Hairston, 46 F.3d 361 (4th Cir. 1995); State v. Singh, 167 Wash. App. 971, 275 P.3d 1156 (Div. 3 2012).

[6] U.S. v. Hairston, 46 F.3d 361 (4th Cir. 1995); Chein v. Shumsky, 323 F.3d 748 (9th Cir. 2003), rev'd on reh'g en banc on other grounds, 373 F.3d 978 (9th Cir. 2004); U.S. v. Strohm, 671 F.3d 1173 (10th Cir. 2011); U.S. v. Naegele, 341 B.R. 349 (D.D.C. 2006); State v. Singh, 167 Wash. App. 971, 275 P.3d 1156 (Div. 3 2012).

[7] U.S. v. Bollin, 264 F.3d 391, 57 Fed. R. Evid. Serv. 429 (4th Cir. 2001); U.S. v. Hernandez, 921 F.2d 1569 (11th Cir. 1991).

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II. Elements of Perjury

C. False Statement or Testimony

2. Knowledge of Falsity

§ 22. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 12

Under both federal[1] and state law, knowledge of the falsity of the statement at the time it is made is an essential element of the crime of perjury.[2] Thus, a person who testifies falsely, but in good faith with the honest belief that he or she is telling the truth, is not guilty of perjury.[3] Similarly, a false answer does not constitute perjury where it was given because of inadvertence,[4] confusion,[5] mistake,[6] or faulty memory.[7]

Knowledge of falsity may be inferred by the trier of fact from the surrounding circumstances.[8] Such an inference may be derived from several sources, including the objective falsity itself, a motive to lie, or facts tending to show generally that the defendant knew that his or her affirmation was false.[9]

Observation:

Objective falsity as proof of knowledge arises when actual falsity is established, and the defendant's awareness of it is inescapable and self-evident.[10]

CUMULATIVE SUPPLEMENT

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Cases:

Defendant failed to show that prosecution witness's statement that he distributed 1.2 to 1.3 kilograms of heroin to defendant was actually false, much less that prosecution knew it to be so, thus precluding defendant's claim that prosecution, which was in possession of drug-quantity chart showing where much of the heroin from the conspiracy was recovered, committed *Napue* violation by knowingly eliciting false testimony from witness regarding quantity of heroin he sold to defendant. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. §§ 841(a)(1), 846(b)(1)(A)(i). United States v. Cross, 249 F. Supp. 3d 339 (D.D.C. 2017).

[END OF SUPPLEMENT]

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Footnotes

[1] 18 U.S.C.A. § 1623.

[2] U.S. v. Smith, 531 F.3d 1261 (10th Cir. 2008); U.S. v. Naegele, 341 B.R. 349 (D.D.C. 2006); People v. McCulloch, 404 Ill. App. 3d 125, 344 Ill. Dec. 214, 936 N.E.2d 743 (2d Dist. 2010); State v. Singh, 167 Wash. App. 971, 275 P.3d 1156 (Div. 3 2012).

[3] U.S. v. Rose, 215 F.2d 617 (3d Cir. 1954).

[4] U.S. v. Martellano, 675 F.2d 940 (7th Cir. 1982); U.S. v. Joseph, 651 F. Supp. 1346 (S.D. Fla. 1987).

[5] U.S. v. Sarihifard, 155 F.3d 301 (4th Cir. 1998); U.S. v. Fawley, 137 F.3d 458, 48 Fed. R. Evid. Serv. 1095 (7th Cir. 1998); Carter v. State, 738 N.E.2d 665 (Ind. 2000).

[6] U.S. v. Sarihifard, 155 F.3d 301 (4th Cir. 1998); U.S. v. Fawley, 137 F.3d 458, 48 Fed. R. Evid. Serv. 1095 (7th Cir. 1998); U.S. v. Singh, 291 F.3d 756 (11th Cir. 2002); Brown v. Eppler, 788 F. Supp. 2d 1261 (N.D. Okla. 2011), aff'd in part, rev'd in part on other grounds, 725 F.3d 1221 (10th Cir. 2013); Carter v. State, 738 N.E.2d 665 (Ind. 2000).

[7] U.S. v. Fawley, 137 F.3d 458, 48 Fed. R. Evid. Serv. 1095 (7th Cir. 1998); U.S. v. Medina-Estrada, 81 F.3d 981, 44 Fed. R. Evid. Serv. 423 (10th Cir. 1996); U.S. v. Singh, 291 F.3d 756 (11th Cir. 2002); U.S. v. Dean, 55 F.3d 640 (D.C. Cir. 1995).

[8] U.S. v. Fawley, 137 F.3d 458, 48 Fed. R. Evid. Serv. 1095 (7th Cir. 1998); U.S. v. Larranaga, 787 F.2d 489, 20 Fed. R. Evid. Serv. 1057 (10th Cir. 1986).

[9] State v. McCaslin, 240 Neb. 482, 482 N.W.2d 558 (1992); State v. Boratto, 80 N.J. 506, 404 A.2d 604 (1979).

[10] State v. McCaslin, 240 Neb. 482, 482 N.W.2d 558 (1992); State v. Boratto, 80 N.J. 506, 404 A.2d 604 (1979).

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II. Elements of Perjury

C. False Statement or Testimony

2. Knowledge of Falsity

§ 23. Ignorance of truth

Topic Summary | Correlation Table | References

West's Key Number Digest
West's Key Number Digest, Perjury 12

Although, as a general rule, a false statement is a necessary element for a perjury conviction,[1] the offense may be committed where, with a corrupt purpose, a person swears to a particular fact without knowing at the time whether it is true or false,[2] and without having probable cause for believing that it is true,[3] even though the statement is in fact true.[4]

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Footnotes

1 §§ 18 to 21.

2 State v. Rupp, 96 Kan. 446, 151 P. 1111 (1915); Butler v. State, 429 S.W.2d 497 (Tex. Crim. App. 1968).

3 East Kentucky Rural Elec. Co-op. Corp. v. Phelps, 275 S.W.2d 592 (Ky. 1955).

4 Com. v. Miles, 140 Ky. 577, 131 S.W. 385 (1910).

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II. Elements of Perjury

D. Materiality of Statement

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Perjury 11(.5) to 11(11)

A.L.R. Library

A.L.R. Index, Perjury
West's A.L.R. Digest, Perjury 11(.5) to 11(11)

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60A Am. Jur. 2d Perjury § 24

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II. Elements of Perjury

D. Materiality of Statement

§ 24. Generally; definition

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 11(.5)

A.L.R. Library

Determination of materiality of allegedly perjurious testimony in prosecution under 18 U.S.C.A. secs. 1621, 1622, 22 A.L.R. Fed. 379

Not every untrue declaration before a court or grand jury violates the perjury statutes;[1] in order to constitute perjury, it is necessary that the false testimony be material[2] to an issue or point of inquiry.[3] In other words, for testimony to be perjured, it must not only be false but must also relate to a "material fact" in the case.[4]

Definition:

"Materiality," as an element of perjury, means relevance[5] in the sense that the answer might tend in a reasonable degree to affect some aspect or result of the inquiry.[6]

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Observation:

Under the Model Penal Code, a falsification is material, regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the proceeding. It is no defense that the accused mistakenly believed the falsification to be immaterial. Whether a falsification is material in a given factual situation is a question of law.[7]

The dismissal of an action does not negate the materiality of false statements made therein under oath.[8]

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Footnotes

1 U.S. v. Littleton, 76 F.3d 614 (4th Cir. 1996).

2 U.S. v. Akram, 152 F.3d 698 (7th Cir. 1998); U.S. v. Wiggan, 700 F.3d 1204 (9th Cir. 2012); U.S. v. Durham, 139 F.3d 1325 (10th Cir. 1998); State v. Rollins, 264 Kan. 466, 957 P.2d 438 (1998); State v. Purnell, 161 N.J. 44, 735 A.2d 513 (1999); State v. LaCourse, 168 Vt. 162, 716 A.2d 14 (1998).

3 U.S. v. Littleton, 76 F.3d 614 (4th Cir. 1996); State v. LaCourse, 168 Vt. 162, 716 A.2d 14 (1998).

4 March v. Midwest St. Louis, L.L.C., 2012 WL 4499046 (Mo. Ct. App. E.D. 2012), reh'g and/or transfer denied, (Nov. 13, 2012).

5 People v. Davis, 164 Ill. 2d 309, 207 Ill. Dec. 484, 647 N.E.2d 977 (1995); Com. v. Giles, 350 Mass. 102, 213 N.E.2d 476 (1966).

6 Com. v. Giles, 350 Mass. 102, 213 N.E.2d 476 (1966).
As to the tests for materiality as an element of perjury, see § 25.

7 Model Penal Code § 241.1(2).

8 State v. Hawkins, 620 N.W.2d 256 (Iowa 2000).

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60A Am. Jur. 2d Perjury § 25

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II. Elements of Perjury

D. Materiality of Statement

§ 25. Test of materiality, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 11(2)

A.L.R. Library

Determination of "materiality" under 18 U.S.C.A. sec. 1623, penalizing false material declarations before grand jury or court, 60 A.L.R. Fed. 76

The test of the materiality of a statement, as an essential element of perjury under federal law[1] or state law, is whether the false statement would or could influence a tribunal or jury on the issue before it.[2] Indeed, a finding of materiality is appropriate, in a prosecution for perjury, if the testimony is capable of influencing the fact finder's determinations,[3] and it is irrelevant whether the fact finder was actually influenced by the false testimony.[4]

The false statement need not be material to the main issue.[5] It is sufficient if the statement is collaterally,[6] remotely, or circumstantially material or if it has a legitimate tendency to prove or disprove some fact that is material, irrespective of the main fact at issue.[7] Thus, a statement will generally support a charge of perjury if it is material to any proper matter of inquiry[8] and if it is calculated and intended to bolster the testimony of a witness on some material point or to support or attack the credibility of the witness.[9] A defendant's responses to questions on cross-examination going to his or her credibility are not necessarily "material," for purposes of the perjury statute, since certain lies on cross-examination might be too trivial to count as being relevant to the question of credibility, and some cases might involve such irrefutable and objective proof that the issue of the defendant's credibility is itself a minor consideration and not one capable of influencing the jury's decision.[10]

Observation:

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The view has been expressed that for the purposes of establishing perjury, a statement can be neither material nor immaterial in itself, but its materiality must be determined in accordance with its relation to some extraneous matter.[11] Moreover, the strength or weakness of the evidence available to disprove an accused's false testimony must not be considered in determining the materiality of the testimony. A false statement made under oath is material and perjurious if it concerns an issue essential to the decision of the court and could influence the court if believed, and this is true even if the statement may easily be proved false beyond any doubt and thus, in a practical sense, could not influence the court.[12]

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Footnotes

1 18 U.S.C.A. §§ 1621 to 1623.

2 U.S. v. Roberts, 308 F.3d 1147 (11th Cir. 2002); People v. Hedgecock, 51 Cal. 3d 395, 272 Cal. Rptr. 803, 795 P.2d 1260 (1990); Com. v. Thurman, 691 S.W.2d 213 (Ky. 1985); Sheriff, Clark County v. Hecht, 101 Nev. 779, 710 P.2d 728 (1985).

3 U.S. v. McKenna, 327 F.3d 830, 61 Fed. R. Evid. Serv. 123 (9th Cir. 2003); U.S. v. Renteria, 138 F.3d 1328 (10th Cir. 1998); U.S. v. Roberts, 308 F.3d 1147 (11th Cir. 2002); In re Sealed Case, 162 F.3d 670, 50 Fed. R. Evid. Serv. 731 (D.C. Cir. 1998).

4 U.S. v. Benkahla, 437 F. Supp. 2d 541 (E.D. Va. 2006); Holbrooks v. Com., 85 S.W.3d 563 (Ky. 2002), as modified, (Oct. 3, 2002).

5 U.S. v. Giarratano, 622 F.2d 153, 6 Fed. R. Evid. Serv. 688 (5th Cir. 1980); Com. v. Thurman, 691 S.W.2d 213 (Ky. 1985); State v. Wood, 67 Or. App. 218, 678 P.2d 1238 (1984).

6 U.S. v. Byrnes, 644 F.2d 107 (2d Cir. 1981); U.S. v. Abroms, 947 F.2d 1241, 34 Fed. R. Evid. Serv. 1347 (5th Cir. 1991), as amended on denial of reh'g, (Dec. 18, 1991).

7 State v. Hawkins, 620 N.W.2d 256 (Iowa 2000); State v. French, 509 N.W.2d 698 (S.D. 1993).

8 U.S. v. Carson, 464 F.2d 424 (2d Cir. 1972); U.S. v. Giarratano, 622 F.2d 153, 6 Fed. R. Evid. Serv. 688 (5th Cir. 1980); U.S. v. Wesson, 478 F.2d 1180 (7th Cir. 1973).

9 United States v. Collins, 272 F.2d 650, 88 A.L.R.2d 847 (2d Cir. 1959); State v. Hawkins, 620 N.W.2d 256 (Iowa 2000); State v. Elder, 199 Kan. 607, 433 P.2d 462 (1967).

10 U.S. v. Akram, 152 F.3d 698 (7th Cir. 1998).

11 State v. Rollins, 264 Kan. 466, 957 P.2d 438 (1998).

12 Sheriff, Clark County v. Hecht, 101 Nev. 779, 710 P.2d 728 (1985).

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60A Am. Jur. 2d Perjury § 26

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II. Elements of Perjury

D. Materiality of Statement

§ 26. Materiality at time of statement; witness' knowledge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 11(3)

The materiality of false statements is to be determined with reference to the circumstances existing at the time the statements were made, without regard to subsequent events.[1] Also, it is not necessary that the witness know that the testimony is material.[2]

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Footnotes

1 U.S. v. Gremillion, 464 F.2d 901, 22 A.L.R. Fed. 368 (5th Cir. 1972); U.S. v. Burge, 711 F.3d 803 (7th Cir. 2013), cert. denied, 134 S. Ct. 315 (2013); U.S. v. Lococo, 450 F.2d 1196 (9th Cir. 1971); U.S. v. Naddeo, 336 F. Supp. 238 (N.D. Ohio 1972).

2 State v. Sargood, 80 Vt. 415, 68 A. 49 (1907).

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60A Am. Jur. 2d Perjury § 27

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II. Elements of Perjury

D. Materiality of Statement

§ 27. Grand jury testimony

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 11(7)

A.L.R. Library

Determination of "materiality" under 18 U.S.C.A. sec. 1623, penalizing false material declarations before grand jury or court, 60 A.L.R. Fed. 76

In the case of grand jury testimony, the rule generally applied under federal[1] and state law to determine the materiality of false testimony is whether the false declaration has a tendency to influence, impede, or dissuade the grand jury from pursuing its investigation,[2] not whether the testimony actually impedes it.[3]

Materiality is tested as of the time the investigation is being made, and later proof that a truthful declaration would not have helped the grand jury does not render the false testimony immaterial.[4]

The testimony need not be material to the main issue or directed to the primary subject of the grand jury investigation.[5] It is sufficient if it is relevant to any subsidiary[6] or collateral[7] issue then under consideration or to any proper matter of inquiry.[8]

Observation:

A defendant may make a false "material" declaration to a grand jury although the declaration does not directly concern an element of a crime pertinent to the grand jury's investigation and does not actually influence the grand jury; the government needs only to establish a nexus between the false declaration and the scope of the grand jury's investigation.[9]

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To obtain a perjury conviction, the government need not show that because of perjured testimony, the grand jury threw in the towel; grand jurors are free to disbelieve a witness and persevere in their investigation without immunizing the perjurer.[10]

Observation:

In a grand jury investigation of a yet unsolved crime, a witness' blanket denial of involvement is material when it tends to impede the investigation not only as to the involvement of the witness as a perpetrator but also as to the involvement of other participants. The witness' prior conviction of the crime under investigation does not render such a general denial immaterial where truthful testimony would aid the prosecution's understanding and investigation of the crime and would be of benefit in identifying and obtaining convictions of other participants.[11]

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Footnotes

1 18 U.S.C.A. §§ 1621 to 1623.

2 U.S. v. Silveira, 426 F.3d 514 (1st Cir. 2005); U.S. v. Regan, 103 F.3d 1072 (2d Cir. 1997); U.S. v. Reilly, 33 F.3d 1396, 39 Fed. R. Evid. Serv. 1213 (3d Cir. 1994); U.S. v. Gulley, 992 F.2d 108 (7th Cir. 1993); U.S. v. Benkahla, 437 F. Supp. 2d 541 (E.D. Va. 2006).

3 U.S. v. Sarihifard, 155 F.3d 301 (4th Cir. 1998); U.S. v. Swift, 809 F.2d 320, 22 Fed. R. Evid. Serv. 571 (6th Cir. 1987); U.S. v. Gulley, 992 F.2d 108 (7th Cir. 1993).

4 U.S. v. Percell, 526 F.2d 189 (9th Cir. 1975).

5 People v. Maestas, 199 Colo. 143, 606 P.2d 849 (1980); People v. Spomer, 631 P.2d 1156 (Colo. App. 1981).

6 U.S. v. Percell, 526 F.2d 189 (9th Cir. 1975).

7 U.S. v. Kiszewski, 877 F.2d 210 (2d Cir. 1989).

8 U.S. v. Ostertag, 671 F.2d 262 (8th Cir. 1982).

9 U.S. v. Doherty, 906 F.2d 41 (1st Cir. 1990).

10 Brogan v. U.S., 522 U.S. 398, 118 S. Ct. 805, 139 L. Ed. 2d 830 (1998).

11 U.S. v. Ostertag, 671 F.2d 262 (8th Cir. 1982).

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60A Am. Jur. 2d Perjury III A Refs.

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III. Particular Conduct as Constituting Perjury

A. Conduct in Judicial or Other Types of Official Proceedings

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West's Key Number Digest

West's Key Number Digest, Perjury 5 to 8

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III. Particular Conduct as Constituting Perjury

A. Conduct in Judicial or Other Types of Official Proceedings

§ 28. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 5

A.L.R. Library

Effect of prosecutor's failure to warn grand jury witness of status as target or subject of grand jury investigation upon subsequent prosecution of witness for perjury based on testimony before grand jury, 89 A.L.R. Fed. 498

At common law and under various statutes, a charge of perjury can be predicated only upon an oath or affirmation taken in the course of a judicial proceeding.[1] In some jurisdictions, however, the common law has been modified by statute so that the crime of perjury includes the falsification of oaths authorized by law and legally administered, irrespective of whether they are taken in the course of a judicial proceeding.[2] Thus, perjury may be assigned on false statements in any official proceeding,[3] on false testimony before a state board authorized to administer oaths and subpoena and examine witnesses,[4] or in a legislative inquiry.[5]

Perjury may also be imposed when movants are untruthful in a postconviction action or proceedings.[6]

Observation:

Wherever any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, in writing of such person which is subscribed by him or her, as true under penalty of perjury and dated.[7]

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Footnotes

1 § 1.

2 People v. Watson, 85 Ill. App. 3d 649, 40 Ill. Dec. 781, 406 N.E.2d 1148 (4th Dist. 1980).

3 People v. Chaussee, 880 P.2d 749 (Colo. 1994).

4 People v. Watson, 85 Ill. App. 3d 649, 40 Ill. Dec. 781, 406 N.E.2d 1148 (4th Dist. 1980) (upholding conviction for perjury by false sworn testimony in hearing before state board of elections); State v. Vahlsing, 557 A.2d 946 (Me. 1989) (evidence concerning statements the defendant made under oath at a hearing before the Board of Environmental Protection concerning ownership of a hazardous-waste site).

5 §§ 31, 32.

6 Whitty v. State, 5 So. 3d 724 (Fla. 2d DCA 2009); Garlotte v. State, 915 So. 2d 460 (Miss. Ct. App. 2005).

7 28 U.S.C.A. § 1746 (unsworn declarations as subject to penalty of perjury).

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III. Particular Conduct as Constituting Perjury

A. Conduct in Judicial or Other Types of Official Proceedings

§ 29. Federal statutes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 5

Under federal law, the general perjury statute provides, in effect, that a person is guilty of perjury if, having taken an oath in any case in which a law of the United States authorizes an oath to be administered, he or she willfully and contrary to such oath states or subscribes any material matter that he or she does not believe to be true.[1] This statute covers ex parte proceedings and investigations, as well as ordinary adversary suits and proceedings.[2]

The false-declarations statute,[3] in essence, makes it an offense to knowingly make, under oath, a false material declaration in a proceeding before or ancillary to any court or grand jury of the United States.[4]

Federal law also makes it an offense to testify falsely before the Merit Systems Protection Board,[5] the United States Secretary of Agriculture,[6] the United States Secretary of the Interior,[7] the Federal Election Commission,[8] and the National Credit Union Administration Board.[9]

Observation:

It is also an offense, under the Uniform Code of Military Justice, for any person to willfully and corruptly give any false testimony material to an issue or matter of inquiry or subscribe any false statement material to the issue or matter of inquiry.[10]

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Footnotes

[1] 18 U.S.C.A. § 1621(1).

[2] Woolley v. U.S., 97 F.2d 258 (C.C.A. 9th Cir. 1938); U.S. v. Zonca, 97 F. Supp. 2d 1127 (M.D. Fla. 1999), aff'd, 208 F.3d 1012 (11th Cir. 2000).

[3] 18 U.S.C.A. § 1623.

[4] U.S. v. Whimpy, 531 F.2d 768 (5th Cir. 1976); U.S. v. Boberg, 565 F.2d 1059 (8th Cir. 1977).

[5] 5 U.S.C.A. § 1507 (proceedings investigating political activities of government employees as not exempt from prosecution and punishment for perjury).

[6] 7 U.S.C.A. § 2622(b) (false testimony in proceedings pertaining to potato research and promotion as not exempt from prosecution and punishment for perjury); 7 U.S.C.A. § 4911(b) (false testimony in proceedings pertaining to watermelon research and promotion as not exempt from prosecution and punishment for perjury).

[7] 16 U.S.C.A. § 364 (false testimony in proceedings investigating an applicant for a bathhouse or hot-water lease or contract at Hot Springs National Park); 25 U.S.C.A. § 399 (false statements concerning the lease, sale, or surrender of allotted or unalloted mining claims).

[8] 26 U.S.C.A. § 9003 (false certification of campaign expenses to the Presidential Election Campaign Fund).

[9] 12 U.S.C.A. § 1784(c) (false testimony in proceedings in connection with examinations of insured credit unions, or with other types of investigations to determine compliance with applicable law and regulations, as not exempt from prosecution and punishment for perjury).

[10] 10 U.S.C.A. § 931 (perjury subject to court-martial).

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III. Particular Conduct as Constituting Perjury

A. Conduct in Judicial or Other Types of Official Proceedings

§ 30. Perjury in verification of pleadings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 5

A person who willfully swears to a pleading, knowing it to contain false statements as to material facts, may thereby commit perjury.[1]

A postconviction movant, who falsely signs an oath that, under penalty of perjury, information in the petition is true, can be convicted of perjury.[2]

However, perjury cannot be assigned upon a false oath made in verifying a pleading of a type not required to be verified by oath.[3]

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Footnotes

1 Fred Nemerovski & Co. v. Barbara, 106 Ill. App. 2d 466, 246 N.E.2d 124 (1st Dist. 1969); State v. Heyes, 44 Wash. 2d 579, 269 P.2d 577 (1954).

2 State v. Shearer, 628 So. 2d 1102 (Fla. 1993).

3 People v. Godines, 17 Cal. App. 2d 721, 62 P.2d 787 (2d Dist. 1936).

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III. Particular Conduct as Constituting Perjury

A. Conduct in Judicial or Other Types of Official Proceedings

§ 31. Perjury in congressional or legislative committee proceedings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 7, 8

A person who willfully gives false testimony before a congressional committee is guilty of perjury, assuming the proper administration of the oath[1] and the proper establishment and composition of the committee.[2]

Observation:

The general federal perjury statute[3] may be the basis for a perjury charge for false testimony before a congressional committee,[4] or where the testimony is given in the District of Columbia, the charge may be brought under that district's perjury statute.[5]

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Footnotes

1 U.S. v. Debrow, 346 U.S. 374, 74 S. Ct. 113, 98 L. Ed. 92 (1953); Seymour v. U. S., 77 F.2d 577, 99 A.L.R. 880 (C.C.A. 8th Cir. 1935).

2 § 32.

3 18 U.S.C.A. § 1621.

4 U.S. v. Debrow, 346 U.S. 374, 74 S. Ct. 113, 98 L. Ed. 92 (1953); Seymour v. U. S., 77 F.2d 577, 99 A.L.R. 880 (C.C.A. 8th Cir. 1935).

[5] Myres v. U.S., 338 U.S. 849, 70 S. Ct. 91, 94 L. Ed. 520 (1949).

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III. Particular Conduct as Constituting Perjury

A. Conduct in Judicial or Other Types of Official Proceedings

§ 32. Perjury in congressional or legislative committee proceedings—Competency of committee

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 7, 8

A.L.R. Library

Offense of perjury as affected by lack of jurisdiction by court or governmental body before which false testimony was given, 36 A.L.R.3d 1038

An essential element of perjury before a congressional committee is the competency of the committee as a tribunal, which is determined in accordance with rules established by Congress or by the house whose committee is involved in a particular case. Since Congress and its houses have the power to define what tribunal is competent to exact testimony, as well as the conditions that establish its competency to do so, the competency of a congressional committee in a perjury case turns on what rules Congress or its houses have established and whether those rules have been followed. It does not depend on what rules Congress or its houses may establish for their own governance or on whether presumptions of continuity may protect the validity of its legislative conduct.[1]

Unless a quorum is present when a witness testifies, a congressional committee is not a competent tribunal.[2] Furthermore, a congressional or legislative committee is not a competent tribunal, and false testimony before it does not constitute perjury, when the committee questions a witness solely for a purpose other than to elicit facts in aid of legislation.[3]

Practice Tip:

A perjury conviction cannot be based on false testimony before a congressional or legislative committee that does not have the power or authority to hear the matter in which the false testimony is given.[4]

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Footnotes

1 Christoffel v. U.S., 338 U.S. 84, 69 S. Ct. 1447, 93 L. Ed. 1826 (1949).

2 Christoffel v. U.S., 338 U.S. 84, 69 S. Ct. 1447, 93 L. Ed. 1826 (1949); U.S. v. Reinecke, 524 F.2d 435 (D.C. Cir. 1975).

3 Christoffel v. U.S., 338 U.S. 84, 69 S. Ct. 1447, 93 L. Ed. 1826 (1949); Masinia v. U.S., 296 F.2d 871 (8th Cir. 1961); U.S. v. Cross, 170 F. Supp. 303 (D. D.C. 1959).

4 Christoffel v. U.S., 338 U.S. 84, 69 S. Ct. 1447, 93 L. Ed. 1826 (1949); Masinia v. U.S., 296 F.2d 871 (8th Cir. 1961); U.S. v. Cross, 170 F. Supp. 303 (D. D.C. 1959).

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III. Particular Conduct as Constituting Perjury

A. Conduct in Judicial or Other Types of Official Proceedings

§ 33. Perjury in grand jury proceedings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 6

Trial Strategy

Representing the Grand Jury Target Witness, 38 Am. Jur. Trials 651 § 37 (Understanding and answering questions—Perjury)

Perjury may be predicated on false statements made by a witness before a grand jury.[1] However, the statement must be material to a matter that the grand jury has the power to investigate.[2]

Under federal law, it is an offense to knowingly make, under oath, a false material declaration in a proceeding before or ancillary to any grand jury of the United States.[3] To establish guilt under this statute prohibiting perjury before a grand jury, the government must prove beyond a reasonable doubt that: (1) the defendant made a declaration under oath before a grand jury, (2) such declaration was false, (3) the defendant knew the declaration was false, and (4) the false declaration was material to the grand jury's inquiry.[4] The declaration, however, must relate to a matter that the grand jury has the power to investigate.[5]

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Footnotes

1 LaChance v. Erickson, 522 U.S. 262, 118 S. Ct. 753, 139 L. Ed. 2d 695 (1998); People v. Onorato, 36 Colo. App. 178, 538 P.2d 898 (App. 1975).

2 § 16.

[3] 18 U.S.C.A. § 1623.

[4] U.S. v. Blanton, 281 F.3d 771 (8th Cir. 2002); U.S. v. Hasan, 609 F.3d 1121 (10th Cir. 2010).

[5] § 16.

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III. Particular Conduct as Constituting Perjury

B. Conduct in Making Affidavits or Giving Depositions

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A.L.R. Library

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III. Particular Conduct as Constituting Perjury

B. Conduct in Making Affidavits or Giving Depositions

§ 34. Generally; intent to falsify affidavit or deposition

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 10

The common-law definition of perjury[1] has been statutorily extended by most jurisdictions to include false testimony given in any deposition or affidavit authorized by law, regardless of whether it is given in a judicial proceeding.[2] Accordingly, one who files a false affidavit required by statute may be fined and imprisoned for perjury.[3]

The federal false-declarations statute[4] applies to civil depositions.[5]

As a general rule, in order to constitute perjury or false swearing, a false affidavit must be made with the intent that it will be uttered or published as true.[6] Ordinarily, the offense is complete the moment the accused has signed and sworn to the false instrument with such intent, and it is immaterial that the affidavit is never used for the purpose intended[7] or that it is not sufficient for such purpose.[8]

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Footnotes

1 § 1.

2 State v. Denny, 361 N.C. 662, 652 S.E.2d 212 (2007); State v. Carr, 319 Or. 408, 877 P.2d 1192 (1994); Hutcheson v. State, 980 S.W.2d 237 (Tex. App. Eastland 1998), petition for discretionary review refused, (Feb. 3, 1999).

3 LaChance v. Erickson, 522 U.S. 262, 118 S. Ct. 753, 139 L. Ed. 2d 695 (1998).

4 18 U.S.C.A. § 1623.

5 U.S. v. Kross, 14 F.3d 751 (2d Cir. 1994); U.S. v. McAfee, 8 F.3d 1010 (5th Cir. 1993); U.S. v. Manfredi, 789 F. Supp. 961 (N.D. Ind. 1992).

[6] U.S. v. Noveck, 273 U.S. 202, 47 S. Ct. 341, 71 L. Ed. 610 (1927).

[7] Lenzy v. State, 1993 OK CR 53, 864 P.2d 847 (Okla. Crim. App. 1993).

[8] State v. Sands, 123 N.H. 570, 467 A.2d 202, 37 A.L.R.4th 904 (1983).

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B. Conduct in Making Affidavits or Giving Depositions

§ 35. Perjury in affidavits required by boards or officials administering statutes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 10

A charge of perjury may be predicated on an affidavit or statement under oath that is required by a board or an official in the administration of a statute.[1] However, an affidavit or statement under an invalid regulation will not support a charge of perjury,[2] and whatever may be the requirements as to the oath to be taken under the regulation, perjury cannot be based upon false statements as to certain matters made under oath where statements as to such matters are not required.[3]

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Footnotes

1 People v. Ziady, 8 Cal. 2d 149, 64 P.2d 425, 108 A.L.R. 1234 (1937); State ex rel. Richardson v. Lawrence, 120 Fla. 836, 163 So. 231, 101 A.L.R. 1259 (1935).

2 U.S. v. George, 228 U.S. 14, 33 S. Ct. 412, 57 L. Ed. 712 (1913).

3 State v. Parrish, 129 La. 547, 56 So. 503 (1911).

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B. Conduct in Making Affidavits or Giving Depositions

§ 36. Perjury in other particular affidavits

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 10

As a general rule, perjury may be assigned on an affidavit to procure a marriage license,[1] or obtain a search warrant,[2] or to procure issuance of an arrest warrant[3] or on an affidavit accompanying a habeas application.[4] A charge of perjury may also be based on a criminal defendant's application for court-appointed counsel[5] or on a real-property-transfer gains tax affidavit.[6] Moreover, the willful making of a false affidavit constitutes perjury where a statute imposes a license tax on those purporting to sell goods at certain kinds of sales, including bankruptcy, closing-out, and fire sales, and requires an application for a license to be accompanied by an affidavit stating certain facts as to the goods to be sold.[7]

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Footnotes

1 § 37.

2 People v. Truer, 168 Cal. App. 3d 437, 214 Cal. Rptr. 869 (5th Dist. 1985).

3 Watson v. State, 235 Ga. App. 381, 509 S.E.2d 87 (1998).

4 Lee v. State, 2004 WL 334573 (Tex. App. Austin 2004), petition for discretionary review refused, (July 28, 2004).

5 People v. Schupper, 140 P.3d 293 (Colo. App. 2006); State v. Tyler, 251 Kan. 616, 840 P.2d 413 (1992).

6 People v. De Leo, 185 A.D.2d 374, 585 N.Y.S.2d 629 (3d Dep't 1992).

7 State v. Kartus, 230 Ala. 352, 162 So. 533, 101 A.L.R. 1336 (1935).

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III. Particular Conduct as Constituting Perjury

C. Other Particular Conduct

§ 37. Application for marriage license

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 1

A perjury charge may be based on false statements made, under an oath lawfully authorized and administered, in relation to matter which is material to the application for a marriage license.[1]

Thus, where a county judge is permitted by statute to issue a marriage license only when it appears that there is no impediment to the marriage, a false statement made in an affidavit that there are no impediments to the affiant's marriage is perjury where the affidavit, although not expressly required by statute, is required by the county judge, and the statement is made for the purpose of concealing a legal impediment to the marriage.[2]

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Footnotes

1 State ex rel. Richardson v. Lawrence, 120 Fla. 836, 163 So. 231, 101 A.L.R. 1259 (1935); Cassady v. State, 18 Okla. Crim. 568, 197 P. 171 (1921).

2 State ex rel. Richardson v. Lawrence, 120 Fla. 836, 163 So. 231, 101 A.L.R. 1259 (1935).

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III. Particular Conduct as Constituting Perjury

C. Other Particular Conduct

§ 38. Tax return

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 1

Generally, a false statement in an income tax return may constitute perjury, despite a provision of the federal revenue statutes punishing those who willfully attempt to defeat or evade income taxes, since the two offenses, although arising out of the same transaction, are distinct. Thus, the crime of perjury is complete when a person swears falsely to the income tax return with the necessary intent even if the false affidavit is never used.[1]

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Footnotes

[1] U.S. v. Noveck, 273 U.S. 202, 47 S. Ct. 341, 71 L. Ed. 610 (1927); Levin v. U.S., 5 F.2d 598 (C.C.A. 9th Cir. 1925).

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60A Am. Jur. 2d Perjury IV A Refs.

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IV. Prosecution of Case; Practice and Procedure

A. In General; Jurisdiction

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Perjury 9(1)

A.L.R. Library

A.L.R. Index, Perjury
West's A.L.R. Digest, Perjury 9(1)

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IV. Prosecution of Case; Practice and Procedure

A. In General; Jurisdiction

§ 39. Jurisdiction of state court over perjury in federal court

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 9(1)

The giving of false testimony in a proceeding authorized or required by federal law is a crime against the United States, and state courts cannot assume jurisdiction[1] since the power to punish a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had. In other words, a witness who gives testimony, pursuant to the Constitution and laws of the United States, in a case pending in a court or other judicial tribunal of the United States, whether in the presence of that tribunal, or before any federal or state magistrate or officer designated by an act of Congress for the purpose, is accountable for the truth of his or her testimony to the United States only.[2]

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Footnotes

1 Caha v. U.S., 152 U.S. 211, 14 S. Ct. 513, 38 L. Ed. 415 (1894).

2 Thomas v. Loney, 134 U.S. 372, 10 S. Ct. 584, 33 L. Ed. 949 (1890).

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IV. Prosecution of Case; Practice and Procedure

A. In General; Jurisdiction

§ 40. Jurisdiction of federal court over perjury in state court

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 9(1)

Federal courts have jurisdiction over false testimony taken in a state court proceeding if a federal statute confers on the state court jurisdiction to conduct the proceeding and makes false testimony under oath in the proceeding a perjury.[1]

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Footnotes

[1] Holmgren v. U.S., 217 U.S. 509, 30 S. Ct. 588, 54 L. Ed. 861 (1910).

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IV. Prosecution of Case; Practice and Procedure

B. Indictment or Information

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Indictment and Information 71.4(11), 110(33)
West's Key Number Digest, Perjury 18.1 to 25(7)

A.L.R. Library

A.L.R. Index, Indictments and Informations
A.L.R. Index, Perjury
West's A.L.R. Digest, Indictment and Information 71.4(11), 110(33)
West's A.L.R. Digest, Perjury 18.1 to 25(7)

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IV. Prosecution of Case; Practice and Procedure

B. Indictment or Information

1. In General

§ 41. Generally; allegations in indictment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indictment and Information 71.4(11)
West's Key Number Digest, Perjury 18.1

The requirements as to indictments for perjury are usually controlled by statutes authorizing a short, simple form of indictment.[1] Consequently, an indictment for perjury is generally considered sufficient if it states the substance of the proceedings in which the false testimony was given, the materiality of the testimony, the court or officer who administered the oath, his or her authority to administer it, the fact testified to on which the perjury is assigned, and that the defendant's testimony in that respect was willfully and corruptly false.[2]

Practice Tip:

An indictment for perjury or false swearing is sufficient if it is drawn in the statutory language[3] provided the language itself meets constitutional standards.[4] However, where the statutory language is general in nature, an indictment couched solely in its terms, without supporting factual allegations concerning the means employed in committing the offense, is legally insufficient.[5]

An indictment for perjury is not defective for failure to allege an essential element of the offense by reason of a mistake in stating the facts to which the accused falsely testified where the mistaken fact is not one descriptive of the offense.[6] Likewise, the misnomer of one of the persons about whom false testimony is alleged to have been given does not render a perjury indictment bad if the allegation can be eliminated from the indictment as surplusage without marring or affecting its sufficiency.[7]

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An indictment charging a defendant with the crimes of perjury and conspiracy to commit perjury would not be quashed based upon the fact that the same grand jurors who heard the defendant testify, and were therefore witnesses to his alleged perjury, were the same grand jurors who returned the indictment against him, even though it would have been the better practice not to seek the perjury and conspiracy indictments from the same grand jury who heard the alleged perjury, where there is no evidence of any fraud or wrongdoing on the part of the grand jurors.[8]

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Footnotes

1 State v. Terline, 23 R.I. 530, 51 A. 204 (1902).

2 People v. Polk, 21 Ill. 2d 594, 174 N.E.2d 393 (1961); Gardner v. State, 229 Ind. 368, 97 N.E.2d 921 (1951); State v. Sands, 123 N.H. 570, 467 A.2d 202, 37 A.L.R.4th 904 (1983).
As to the requirements for allegations of particular elements of perjury, see §§ 47 to 56.

3 Franzi v. Superior Court of Arizona In and For Pima County, 139 Ariz. 556, 679 P.2d 1043 (1984); State v. Doto, 16 N.J. 397, 109 A.2d 9 (1954).

4 State v. Doto, 16 N.J. 397, 109 A.2d 9 (1954).

5 People v. Toner, 55 Ill. App. 3d 688, 13 Ill. Dec. 553, 371 N.E.2d 270 (1st Dist. 1977).

6 State v. Terline, 23 R.I. 530, 51 A. 204 (1902); Hardin v. State, 85 Tex. Crim. 220, 211 S.W. 233, 4 A.L.R. 1308 (1919).

7 Hardin v. State, 85 Tex. Crim. 220, 211 S.W. 233, 4 A.L.R. 1308 (1919).

8 Smallwood v. State, 584 So. 2d 733 (Miss. 1991).

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IV. Prosecution of Case; Practice and Procedure

B. Indictment or Information

1. In General

§ 42. Generally; allegations in indictment—Federal statutes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indictment and Information 110(33)
West's Key Number Digest, Perjury 18.1

Under the general federal perjury statute,[1] a perjury indictment must contain minimum allegations that the person charged was under an oath authorized by the laws of the United States, that the testimony was taken before a competent tribunal or person, and that it was willfully made as to facts material to the matter under inquiry or investigation.[2] There is also authority holding that indictments or informations for perjury should, by proper designation, show by whom the oath was administered.[3]

Under the federal false-declarations statute,[4] to be sufficient, an indictment needs to contain merely the elements of the offense charged, informing the defendant of the charges against him or her and enabling him or her to invoke a double jeopardy defense in subsequent proceedings.[5]

Observation:

An indictment satisfactorily recites the statutory elements of perjury, and thereby adequately apprises the defendant of the offense he or she must be prepared to meet, by alleging that he or she knowingly made a false declaration concerning a material matter in his or her testimony before the grand jury while under oath, by citing the statute allegedly violated, and by setting forth not only the time, place, and precise questions involved with the false testimony but also the subject under inquiry by the grand jury.[6]

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Practice Tip:

It may be sufficient that the offense is charged in the language of the statute[7] although there is contrary authority.[8]

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Footnotes

1 18 U.S.C.A. § 1621.

2 Vuckson v. U.S., 354 F.2d 918 (9th Cir. 1966).

3 § 47.

4 18 U.S.C.A. § 1623.

5 Bednar v. U.S., 651 F. Supp. 672 (E.D. Mo. 1986), judgment aff'd, 855 F.2d 859 (8th Cir. 1988).

6 U.S. v. DeRosa, 438 F. Supp. 548 (D. Mass. 1977), aff'd, 582 F.2d 1269 (1st Cir. 1978).

7 Vuckson v. U.S., 354 F.2d 918 (9th Cir. 1966).

8 U.S. v. Borrelli, 217 F. Supp. 899 (E.D. Pa. 1963).

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IV. Prosecution of Case; Practice and Procedure

B. Indictment or Information

1. In General

§ 43. Description of court

Topic Summary | Correlation Table | References

West's Key Number Digest
West's Key Number Digest, Perjury 21, 22

A perjury indictment's failure to set forth the name of the court in which the defendant was tried is not fatal as a failure to charge an offense since the only requirement concerning an indictment is that it must apprise the defendant of the specific offense with which he or she is charged and enable him or her to invoke a double jeopardy defense in subsequent proceedings.[1]

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Footnotes

[1] Mumford v. State, 52 Del. 48, 144 A.2d 150 (1958); McCullar v. State, 696 S.W.2d 579 (Tex. Crim. App. 1985).

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IV. Prosecution of Case; Practice and Procedure

B. Indictment or Information

1. In General

§ 44. Description of court—Jurisdiction of court

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 22

A.L.R. Library

Offense of perjury as affected by lack of jurisdiction by court or governmental body before which false testimony was given, 36 A.L.R.3d 1038

Ordinarily, it is essential, in the absence of any statutory provision to the contrary, to state in an indictment for perjury that the court or grand jury before whom the offense was committed had jurisdiction of the proceeding, and such jurisdiction should appear with certainty, either by a direct averment or a statement of the facts.[1] However, there is authority holding that a perjury indictment is sufficient without alleging that the grand jury had jurisdiction to pursue the investigation leading to the indictment, the reason being that jurisdiction over the subject of the investigation is not a separate element of perjury but is encompassed in the element of materiality.[2] Thus, as long as the indictment alleges that the alleged perjurious statements are material, the accused is on notice that the State seeks to prove the propriety of its inquiry.[3]

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Footnotes

1 U.S. v. Borrelli, 217 F. Supp. 899 (E.D. Pa. 1963); Malone v. State, 41 Ala. App. 230, 132 So. 2d 749 (1961); State v. Crawford, 94 Idaho 463, 491 P.2d 180 (1971).

2 Franzi v. Superior Court of Arizona In and For Pima County, 139 Ariz. 556, 679 P.2d 1043 (1984).

[3] Franzi v. Superior Court of Arizona In and For Pima County, 139 Ariz. 556, 679 P.2d 1043 (1984).

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IV. Prosecution of Case; Practice and Procedure

B. Indictment or Information

2. Counts of Perjury in Indictment or Information

§ 45. Multiple counts of perjury

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 19(.5) to 19(2)

Statements relating to different matters may be made the basis of separate counts of perjury even though they all refer to the same general subject of inquiry and were made at the same hearing.[1] A joinder of several counts may properly be made where a link has been demonstrated between the overt acts connected with the perjury.[2]

The joinder of perjury and false statements counts in the same indictment has been held proper where: (1) all related to defendant's extrasenatorial activities through a nonprofit corporation he founded; (2) the actions underlying all three counts were part of a common scheme or plan; and (3) all involved substantial alleged dishonesty.[3]

However, the offense cannot be compounded by the repetition of the same question.[4]

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Footnotes

1 U.S. v. De La Torre, 634 F.2d 792, 7 Fed. R. Evid. Serv. 890 (5th Cir. 1981); U.S. v. Scott, 682 F.2d 695 (8th Cir. 1982).

2 U.S. v. Sweig, 316 F. Supp. 1148 (S.D. N.Y. 1970).

3 U.S. v. Ruiz, 894 F.2d 501 (2d Cir. 1990).

4 State v. LaBarre, 114 Ariz. 440, 561 P.2d 764 (Ct. App. Div. 1 1977).

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B. Indictment or Information

2. Counts of Perjury in Indictment or Information

§ 46. Joinder of assignments in single count of perjury

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 19(3)

Generally, several assignments of perjury, given under one oath in one proceeding, may be included in a single count of an indictment or information, and if one assignment is good, the fact that the other assignments are defective will not vitiate the indictment.[1] However, where several statements of the accused are combined in one count and alleged as a whole to be false, failure to prove that all of the statements are false may be fatal to a conviction.[2]

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Footnotes

1 Harrison v. State, 231 Ind. 147, 106 N.E.2d 912, 32 A.L.R.2d 875 (1952); State v. Frames, 213 Kan. 113, 515 P.2d 751 (1973); Miles v. State, 1954 OK CR 33, 268 P.2d 290 (Okla. Crim. App. 1954).

2 Brown v. State, 40 Tex. Crim. 48, 48 S.W. 169 (1898).

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B. Indictment or Information

3. Elements of Perjury

a. Oath

§ 47. Administration of oath

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 23

As a general rule, a perjury indictment must state that the accused was sworn in the proceedings in which the alleged perjury occurred. The statement must be made distinctly and positively and must not be left to appear by inference or argument.[1]

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Footnotes

[1] Bradley v. State, 208 So. 2d 140 (Fla. 3d DCA 1968); People v. Lieberman, 57 Misc. 2d 1070, 294 N.Y.S.2d 117 (Sup 1968).

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B. Indictment or Information

3. Elements of Perjury

a. Oath

§ 48. Authority of oath giver

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 22

Generally, under both federal[1] and state law, an indictment or information for perjury must aver the authority of the officer who administered the oath to the accused.[2] The authority may be made to appear by an express averment or by setting out facts which would make it appear that he or she had such authority.[3]

Practice Tip:

An indictment for perjury under the federal false-declarations statute[4] need not allege that the oath was administered by one authorized by law to do so since the statute contains no such requirement.[5]

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Footnotes

1 18 U.S.C.A. § 1621.

2 State v. Burtchett, 475 S.W.2d 14 (Mo. 1972).

[3] State v. Harter, 131 Iowa 199, 108 N.W. 232 (1906).

[4] 18 U.S.C.A. § 1623.

[5] U.S. v. Devitt, 499 F.2d 135 (7th Cir. 1974).

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B. Indictment or Information

3. Elements of Perjury

a. Oath

§ 49. Identity of oath giver

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 22

Although there is authority holding that perjury indictments or informations should, by proper designation, show by whom the oath was administered,[1] an indictment that follows the statutory form is generally good, without naming the particular clerk, officer, or court that administered the oath.[2] Thus, an indictment that fails to name the person who administered the oath to a witness accused of perjury before a congressional committee is not defective since the person's name is not an essential element of the offense.[3]

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Footnotes

1 U.S. v. Borrelli, 217 F. Supp. 899 (E.D. Pa. 1963); Wilson v. State, 115 Ga. 206, 41 S.E. 696 (1902).

2 Smith v. People, 32 Colo. 251, 75 P. 914 (1904); State v. Sargood, 80 Vt. 415, 68 A. 49 (1907).

3 U.S. v. Debrow, 346 U.S. 374, 74 S. Ct. 113, 98 L. Ed. 92 (1953); McCullar v. State, 696 S.W.2d 579 (Tex. Crim. App. 1985).

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B. Indictment or Information

3. Elements of Perjury

b. False Statement

§ 50. Generally; false statement made in foreign language

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 24

Under federal law[1] and state law, an indictment or information for perjury must set forth the alleged false testimony so that the defendant may be apprised of the particular offense with which he or she is charged; generally, it is sufficient to set out the substance and effect of the testimony without setting forth the exact language used.[2]

Practice Tip:

It is not necessary that a perjury indictment under the general federal perjury statute[3] set out the exact language of the allegedly false testimony if: (1) such testimony is set out in substance; and (2) the defendant's counsel has in his or her possession a transcript of the defendant's entire testimony at the trial in which it is alleged he or she committed the perjury.[4]

Generally, where alleged false testimony has been given in a foreign language, it is not necessary that the perjury indictment show that fact or state the testimony in such language; it is sufficient to set out in the indictment the substance of the testimony in English.[5]

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Footnotes

1 18 U.S.C.A. §§ 1621 to 1623.

2 U.S. v. Ras, 713 F.2d 311, 13 Fed. R. Evid. Serv. 811 (7th Cir. 1983); State v. Lee, 1 Haw. App. 510, 620 P.2d 1091 (1980); Com. v. Lafferty, 276 Pa. Super. 400, 419 A.2d 518 (1980).

3 18 U.S.C.A. § 1621.

4 U.S. v. Rook, 424 F.2d 403 (7th Cir. 1970).

5 State v. Terline, 23 R.I. 530, 51 A. 204 (1902).

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IV. Prosecution of Case; Practice and Procedure

B. Indictment or Information

3. Elements of Perjury

b. False Statement

§ 51. False statement in affidavit

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 24

Although, in an indictment or information for perjury, it is ordinarily sufficient to set out the substance and effect of the false testimony without setting forth the exact language used,[1] there is authority holding that where perjury is committed in making a false affidavit,[2] it is not sufficient to set forth in the indictment only the substance of the affidavit.[3] Accordingly, an indictment charging the commission of perjury by making a voluntary affidavit is sufficient to withstand a motion to quash if it shows the oath alleged to be false with such certainty and particularity as to inform the accused fairly of the charge he or she is called upon to meet.[4]

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Footnotes

1 § 50.

2 § 34.

3 Harrison v. State, 231 Ind. 147, 106 N.E.2d 912, 32 A.L.R.2d 875 (1952).

4 Harrison v. State, 231 Ind. 147, 106 N.E.2d 912, 32 A.L.R.2d 875 (1952).

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IV. Prosecution of Case; Practice and Procedure

B. Indictment or Information

3. Elements of Perjury

b. False Statement

§ 52. Falsity of statement

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 24

The falsity of the statement on which a charge of perjury is based must be alleged in the indictment.[1]

At common law and under certain statutes, it is necessary to make direct and specific allegations negativing the truth of the alleged false testimony by setting out the true facts.[2] A mere general allegation that the testimony is false is insufficient.[3] In other jurisdictions, however, a perjury indictment may be sustained where the falsity is alleged in ordinary and concise language, with such certainty and in such manner as to enable a person of common understanding to know what is intended, without compliance with technical requirements for allegations beyond what is necessary to advise the defendant of the charges against him or her,[4] since the purpose of an indictment is to apprise the accused of the particular offense with which he or she is charged so that he or she may have an opportunity to defend him- or herself.[5]

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Footnotes

1 Hsu v. U. S., 392 A.2d 972 (D.C. 1978); State v. Myers, 634 S.W.2d 620 (Tenn. Crim. App. 1982).

2 Fudge v. State, 57 Fla. 7, 49 So. 128 (1909); Gray v. State, 1910 OK CR 192, 4 Okla. Crim. 292, 111 P. 825 (1910).

3 Fudge v. State, 57 Fla. 7, 49 So. 128 (1909); Gray v. State, 1910 OK CR 192, 4 Okla. Crim. 292, 111 P. 825 (1910).

4 U.S. v. Barnhart, 889 F.2d 1374 (5th Cir. 1989) (an indictment alleging false declarations before a grand jury did not need to specify the factual basis of the falsity; the indictment detailed the time and place of allegedly false, material declarations); U.S. v. Portac, Inc., 869 F.2d 1288, 27 Fed. R. Evid. Serv. 743 (9th Cir. 1989) (in a prosecution for

making false material declarations under oath before a grand jury, the perjury indictment was sufficiently definite; the indictment alleged that defendant's answers were false, and the opposite truth was apparent without any need for particular averment); People v. Mazza, 182 Colo. 166, 511 P.2d 885 (1973).

[5] People v. Mazza, 182 Colo. 166, 511 P.2d 885 (1973); People v. Tatum, 60 Misc. 311, 112 N.Y.S. 36 (Sup 1908).

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IV. Prosecution of Case; Practice and Procedure

B. Indictment or Information

3. Elements of Perjury

b. False Statement

§ 53. Intent to falsify; felonious intent

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 20

An indictment for perjury under federal[1] and state law must allege that the false swearing was willful.[2] However, the omission of the word "willfully" is not fatal if other words of similar import are used; thus, an indictment charging that the defendant feloniously, falsely, and corruptly testified is sufficient since it implies that the testimony was willfully given.[3]

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Footnotes

1 18 U.S.C.A. § 1621.

2 U.S. v. Lake, 129 F. 499 (E.D. Ark. 1904).

3 State v. Jackson, 88 Mont. 420, 293 P. 309 (1930).

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IV. Prosecution of Case; Practice and Procedure

B. Indictment or Information

3. Elements of Perjury

c. Materiality

§ 54. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 25(.5) to 25(7)

In some states, in order to charge perjury in an indictment, the materiality of the false swearing to the issue or point of inquiry must be alleged,[1] either by a general averment[2] or by the facts set forth.[3]

An indictment charging the defendant with perjury is not defective, even though it does not aver that allegedly perjurious statements made by the defendant before a grand jury during the course of a murder investigation are material, where it is clear from the face of the indictment that the defendant's denial of any participation or knowledge of the victim's death was material to the investigation.[4]

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Footnotes

1 People v. Massarella, 80 Ill. App. 3d 552, 36 Ill. Dec. 16, 400 N.E.2d 436 (1st Dist. 1979); People v. Cash, 388 Mich. 153, 200 N.W.2d 83 (1972).

2 § 55.

3 U.S. v. Duran, 41 F.3d 540 (9th Cir. 1994); Com. v. Allison, 434 Mass. 670, 751 N.E.2d 868 (2001).

4 Com. v. Allison, 434 Mass. 670, 751 N.E.2d 868 (2001).

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IV. Prosecution of Case; Practice and Procedure

B. Indictment or Information

3. Elements of Perjury

c. Materiality

§ 55. General allegation of materiality

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 25(2)

As a rule, under both federal[1] and state law, a general averment in an indictment or information for perjury that the false statement is material to the issue, without setting forth the facts from which such materiality appears, is a sufficient averment of materiality[2] provided the facts alleged do not show that the false testimony is not material.[3]

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Footnotes

1 18 U.S.C.A. §§ 1621 to 1623.

2 U.S. v. Davis, 548 F.2d 840 (9th Cir. 1977); U.S. v. Savoy, 38 F. Supp. 2d 406 (D. Md. 1998); State v. Fields, 527 N.E.2d 218 (Ind. Ct. App. 1988); Smallwood v. State, 584 So. 2d 733 (Miss. 1991).

3 § 56.

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B. Indictment or Information

3. Elements of Perjury

c. Materiality

§ 56. General allegation of materiality—Immateriality apparent on face of indictment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 25(7)

Where it clearly appears from the facts set forth in an indictment for perjury that the allegedly false testimony could not have been material to the issue, a general allegation of materiality cannot remedy the defect.[1] Similarly, a general averment of materiality is insufficient where the testimony is set out, and a part of it appears to be immaterial.[2]

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Footnotes

1 U.S. v. Siegel, 152 F. Supp. 370 (S.D. N.Y. 1957); State v. Dunn, 203 Ind. 265, 180 N.E. 5, 80 A.L.R. 1437 (1932) (overruled in part on other grounds by, Gray v. Union Trust Co. of Indianapolis, 213 Ind. 675, 12 N.E.2d 931 (1938)).

2 State v. Crocker, 106 Me. 369, 76 A. 703 (1910).

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Research References

West's Key Number Digest

West's Key Number Digest, Criminal Law 507(9)

West's Key Number Digest, Perjury 29(.5) to 29(4), 34(1) to 34(6)

A.L.R. Library

A.L.R. Index, Perjury
West's A.L.R. Digest, Criminal Law 507(9)
West's A.L.R. Digest, Perjury 29(.5) to 29(4), 34(1) to 34(6)

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IV. Prosecution of Case; Practice and Procedure

C. Proof; Evidence and Witnesses

1. In General

§ 57. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Criminal Law 507(9)

West's Key Number Digest, Perjury 29(.5) to 29(4), 34(1) to 34(6)

The requirements of proof in a perjury case are more stringent than those in any other area of law except treason.[1] Because of the special nature of a perjury charge, pitting as it does the oath of one person against that of another, the proof of falsity must not only satisfy the reasonable-doubt standard[2] applicable in all criminal trials but must also meet certain requirements as to form.[3]

Any person who heard allegedly perjurious statements may testify to them as may the reporter who recorded them in shorthand, the reporter's transcript not being the best evidence.[4] The court clerk may testify concerning the functioning of the court in which the perjury was allegedly committed,[5] and a court reporter may testify that the accused was regularly sworn, that he or she testified in open court in the prior proceedings,[6] and that he or she gave the particular testimony on which the charge of perjury rests.[7] Moreover, a notary public or other officer may testify that an oath had in fact been administered.[8]

In order to convict a person of perjury alleged to have been committed on the trial of a case, the production of the record in that case, or of a duly authenticated transcript thereof, is essential unless the formal proofs of such judicial proceeding are waived or dispensed with by admission or otherwise.[9]

Practice Tip:

The rule requiring that all the record be introduced during a perjury trial refers to a formal trial where the rules of evidence are adhered to and no improper evidence is admitted or at least where the opportunity to object to its admission is afforded. This is not true in a grand jury investigation, however, and the parts of the grand jury record that are immaterial and irrelevant to the issue should not be admitted in a trial for false swearing where they may prejudice the accused or throw no light on his or her innocence.[10]

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Footnotes

1 Jewell v. Com., 296 Ky. 718, 178 S.W.2d 415 (1944); State v. Dial, 44 Wash. App. 11, 720 P.2d 461 (Div. 1 1986).

2 Jewell v. Com., 296 Ky. 718, 178 S.W.2d 415 (1944); In re Disciplinary Proceedings Against Huddleston, 137 Wash. 2d 560, 974 P.2d 325 (1999) (in the criminal context, perjury must be shown by clear, convincing, and direct evidence to a moral certainty and beyond a reasonable doubt); State v. White, 31 Wash. App. 655, 644 P.2d 693 (Div. 1 1982).

3 As to the number of witnesses and corroboration necessary for a conviction for perjury, see §§ 66 to 68.

4 Meyers v. U.S., 171 F.2d 800, 11 A.L.R.2d 1 (D.C. Cir. 1948).

5 People v. Reitz, 86 Cal. App. 791, 261 P. 526 (1st Dist. 1927); Polk v. State, 204 Miss. 538, 37 So. 2d 761 (1948).

6 People v. Reitz, 86 Cal. App. 791, 261 P. 526 (1st Dist. 1927).

7 Hall v. State, 136 Fla. 644, 187 So. 392 (1939); State v. Herrera, 1922-NMSC-035, 28 N.M. 155, 207 P. 1085, 24 A.L.R. 1134 (1922).

8 Holy v. U.S., 278 F. 521 (C.C.A. 7th Cir. 1921).

9 Segal v. U.S., 246 F.2d 814 (8th Cir. 1957).

10 State v. Crowder, 146 W. Va. 810, 123 S.E.2d 42 (1961).

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IV. Prosecution of Case; Practice and Procedure

C. Proof; Evidence and Witnesses

1. In General

§ 58. Proof of oath

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 29(.5) to 29(4)

Under both federal[1] and state law, proof of the charge of perjury requires that sufficient evidence must be offered for the jury to find, beyond a reasonable doubt, that an oath was administered to the defendant by a duly authorized officer before he or she gave the allegedly false testimony.[2]

Observation:

The general federal perjury statute[3] requires greater proof on the oath element than the federal false-declarations statute.[4] More specifically, the general federal perjury statute[5] requires proof that the maker of a willful false statement had "taken an oath before a competent tribunal, officer, or person."[6]

Where the alleged perjury was committed before a grand jury, the transcript of the defendant's grand jury testimony is sufficient to prove that he or she testified under oath, where the transcript reads "having been first duly sworn by foreman to testify," although it is better practice for someone present at the grand jury proceedings to testify to the giving of the oath.[7]

As a general rule, once it is established that an oath was administered and that the witness testified, it is presumed, in the absence of proof to the contrary, that the oath administered was a lawful one.[8]

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Footnotes

[1] 18 U.S.C.A. §§ 1621 to 1623.

[2] U.S. v. Johnson, 25 Fed. Appx. 231 (6th Cir. 2001); U.S. v. Jaramillo, 69 F.3d 388 (9th Cir. 1995); People v. Beacham, 50 Ill. App. 3d 695, 8 Ill. Dec. 499, 365 N.E.2d 737 (1st Dist. 1977).

[3] 18 U.S.C.A. § 1621.

[4] 18 U.S.C.A. § 1623.

[5] 18 U.S.C.A. § 1621.

[6] U.S. v. Molinares, 700 F.2d 647 (11th Cir. 1983).

[7] U.S. v. Picketts, 655 F.2d 837 (7th Cir. 1981).

[8] Kirkland v. State, 140 Ga. App. 197, 230 S.E.2d 347 (1976); State v. Randazzo, 92 N.J. Super. 579, 224 A.2d 341 (App. Div. 1966).

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IV. Prosecution of Case; Practice and Procedure

C. Proof; Evidence and Witnesses

1. In General

§ 59. Proof of materiality

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 29(.5) to 29(4)

In a perjury prosecution, the State must prove that when the defendant's statements were made, they were material to the issue in question,[1] and materiality may not be presumed.[2]

Observation:

Materiality is ordinarily proved by the introduction into evidence of so much of the record of the proceedings at which the statements were made as will establish, beyond a reasonable doubt, the issue or point in question and its relationship with the alleged perjurious statements.[3]

Similarly, under federal law,[4] the burden of proving the materiality of a false statement rests with the prosecution.[5] The prosecution may prove materiality in various ways; thus, where the allegedly false testimony was given before a grand jury, the prosecution may introduce a transcript of the grand jury proceedings,[6] it may produce testimony from the foreperson of the grand jury, or it may produce the testimony of the defendant before the grand jury.[7]

Practice Tip:

The preferred method of proving materiality in a prosecution under the federal false-declarations statute[8] is to introduce the full

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transcript of the grand jury proceedings and to present the testimony of a witness to the proceedings.[9] In fact, the use of anything less than a complete transcript or testimony of the members of the grand jury may be looked on with disfavor by the court.[10]

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Footnotes

1 Franzi v. Superior Court of Arizona In and For Pima County, 139 Ariz. 556, 679 P.2d 1043 (1984); People v. Onorato, 36 Colo. App. 178, 538 P.2d 898 (App. 1975); People v. Anderson, 57 Ill. App. 3d 95, 14 Ill. Dec. 822, 372 N.E.2d 1101 (1st Dist. 1978).

2 People v. Onorato, 36 Colo. App. 178, 538 P.2d 898 (App. 1975).

3 People v. Anderson, 57 Ill. App. 3d 95, 14 Ill. Dec. 822, 372 N.E.2d 1101 (1st Dist. 1978); State v. Roberson, 543 S.W.2d 817 (Mo. Ct. App. 1976).

4 18 U.S.C.A. §§ 1621 to 1623.

5 U.S. v. Farnham, 791 F.2d 331, 20 Fed. R. Evid. Serv. 1031 (4th Cir. 1986); U.S. v. Watson, 623 F.2d 1198, 6 Fed. R. Evid. Serv. 263 (7th Cir. 1980); U.S. v. Varsalona, 710 F.2d 418 (8th Cir. 1983); U.S. v. Smith, 374 F.3d 1240 (D.C. Cir. 2004).

6 U.S. v. Ostertag, 671 F.2d 262 (8th Cir. 1982); Bednar v. U.S., 651 F. Supp. 672 (E.D. Mo. 1986), judgment aff'd, 855 F.2d 859 (8th Cir. 1988).

7 U.S. v. Ostertag, 671 F.2d 262 (8th Cir. 1982).

8 18 U.S.C.A. § 1623.

9 U.S. v. Bell, 623 F.2d 1132 (5th Cir. 1980).

10 U.S. v. Cosby, 601 F.2d 754, 60 A.L.R. Fed. 67 (5th Cir. 1979).

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IV. Prosecution of Case; Practice and Procedure

C. Proof; Evidence and Witnesses

1. In General

§ 60. Proof of falsity by contradictory statements

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 29(.5) to 29(4)

In some jurisdictions, where the alleged perjury involves contradictory statements, there is a presumption that the defendant did not believe both statements alleged in the indictment to be true; hence, the prosecution is not required to specify, or establish by proof, which statement is false[1] or to prove on each statement the defendant's mental state. Rather, the burden is on the defendant to rebut the presumption that he or she did not believe both statements to be true.[2]

Observation:

Under federal law,[3] in order to convict a defendant for perjury on the basis of inconsistent statements, the government must prove, beyond a reasonable doubt, that the defendant, under oath, made two or more declarations that were irreconcilably inconsistent, each of which was material to the point in question and each of which was made within the statute of limitations.[4]

In other jurisdictions, contradictory testimony is not per se perjurious,[5] neither is inconsistent testimony,[6] and a conviction for perjury cannot be sustained merely on the contradictory sworn statements of the defendant; the prosecution must prove which of the two statements is false by evidence other than the contradictory statement.[7] This is particularly true when the conflicts are minor, and the testimony was given at different stages of the proceedings.[8]

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Observation:

Under the Model Penal Code, where the defendant made inconsistent statements under oath or equivalent affirmation, both statements having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count, alleging in the alternative that one or the other was false and not believed by the defendant. In such case, it will not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true.[9]

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Footnotes

1 Nelson v. State, 500 So. 2d 1308 (Ala. Crim. App. 1986); Brown v. State, 288 Ark. 517, 707 S.W.2d 313 (1986); Palmisano v. State, 124 Md. App. 420, 722 A.2d 428 (1999).

2 People v. Mitchell, 44 Ill. App. 3d 399, 2 Ill. Dec. 642, 357 N.E.2d 862 (4th Dist. 1976).

3 18 U.S.C.A. § 1623(c).

4 U.S. v. Porter, 994 F.2d 470 (8th Cir. 1993).

5 Baxter v. State, 727 N.E.2d 429 (Ind. 2000).

6 U.S. v. Tavares, 93 F.3d 10 (1st Cir. 1996) (applying 18 U.S.C.A. § 1621); Baxter v. State, 727 N.E.2d 429 (Ind. 2000).

7 Palmisano v. State, 124 Md. App. 420, 722 A.2d 428 (1999); Matter of S. A. D., 1981 OK CR 18, 625 P.2d 114 (Okla. Crim. App. 1981).

8 People v. Molsby, 66 Ill. App. 3d 647, 23 Ill. Dec. 309, 383 N.E.2d 1336 (1st Dist. 1978).

9 Model Penal Code § 241.1(5).

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IV. Prosecution of Case; Practice and Procedure

C. Proof; Evidence and Witnesses

1. In General

§ 61. Variance between proof and indictment or information

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 29(4)

In accordance with the general principles governing indictments and informations, every element necessary to constitute the crime of perjury or false swearing must be proved in a prosecution for the offense, and the evidence must substantially correspond with and support the material allegations of the indictment or information charging the offense.[1] However, a variance between an allegation in a perjury indictment and the proof is immaterial if the allegation is surplusage and does not constitute a part of the description of the offense.[2]

Observation:

A defendant's conviction of attempt to commit the charged offense of subornation of perjury has been held not to constitute a variance or constructive amendment of the indictment; attempted subornation of perjury is an inchoate form of subornation of perjury, and thus, the defendant had adequate notice to defend himself of that charge.[3]

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Footnotes

[1] U.S. v. Laite, 418 F.2d 576 (5th Cir. 1969); State v. Keziah, 258 N.C. 52, 127 S.E.2d 784 (1962).

[2] State v. Herrera, 1922-NMSC-035, 28 N.M. 155, 207 P. 1085, 24 A.L.R. 1134 (1922).

[3] Riley v. U.S., 647 A.2d 1165 (D.C. 1994).

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IV. Prosecution of Case; Practice and Procedure

C. Proof; Evidence and Witnesses

2. Admissibility of Evidence

§ 62. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 29(3)

The general rule is that any relevant and material evidence may be introduced in a perjury prosecution to prove that the defendant is guilty.[1] Hence, any evidence which tends to show that the statement assigned as perjury or false swearing was given deliberately and willfully, and was not made through misapprehension or under agitation, will be admitted.[2] Accordingly, the prosecution may introduce evidence to show the motive of the accused in committing the alleged crime.[3] Furthermore, the whole res gestae of a transaction, including declarations made at the time by the participants, are admissible against one accused of perjury to show that his or her sworn statements as to some of the particulars of such transaction were false.[4]

When a person falsely testifies under a grant of immunity, the government may use that testimony as evidence of conspiracy to commit perjury.[5]

Observation:

Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and, as part of this agreement, the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, such information is not to be used in determining the applicable sentencing-guideline range except to the extent provided in the agreement. However, this provision does not restrict the use of such information in a prosecution for perjury or giving a false statement.[6]

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Practice Tip:

In some states, the results of a polygraph test administered by an expert may be admitted in a case involving perjury;[7] however, the rule followed in most jurisdictions denies the admissibility of polygraph results.[8]

The following evidence is not generally admissible: (1) a guilty plea which was later withdrawn; (2) a nolo contendere plea; (3) a statement made during a proceeding on either of those pleas under the Federal Rules of Criminal Procedure[9] or a comparable state procedure; or (4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussion did not result in a guilty plea, or they resulted in a later withdrawn guilty plea.[10] However, such evidence is admissible in a criminal proceeding for perjury or false statement if the defendant made the statement under oath, on the record, and with counsel present.[11]

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Footnotes

1 Davis v. State, 107 Tex. Crim. 389, 296 S.W. 605 (1925); Lappley v. State, 170 Wis. 356, 174 N.W. 913, 7 A.L.R. 1279 (1919).
As to the admissibility of corroborative evidence under the two-witness rule, see § 67.

2 State v. Cerfoglio, 46 Nev. 332, 213 P. 102 (1923); McDonough v. State, 47 Tex. Crim. 227, 84 S.W. 594 (1904).

3 State v. Storey, 148 Minn. 398, 182 N.W. 613, 15 A.L.R. 629 (1921); People v. Cahill, 193 N.Y. 232, 86 N.E. 39 (1908).

4 State v. Cerfoglio, 46 Nev. 332, 213 P. 102 (1923).

5 U.S. v. Duran, 41 F.3d 540 (9th Cir. 1994).
As to conspiracy to commit perjury, see §§ 84 to 86.

6 U.S.S.G. § 1B1.8(b)(3).

7 Walther v. O'Connell, 72 Misc. 2d 316, 339 N.Y.S.2d 386 (N.Y. City Civ. Ct. 1972).

8 Am. Jur. 2d, Evidence § 1020.

9 Fed. R. Crim. P. 11.

10 Fed. R. Evid. 410(a).

11 Fed. R. Evid. 410(b)(2).

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IV. Prosecution of Case; Practice and Procedure

C. Proof; Evidence and Witnesses

2. Admissibility of Evidence

§ 63. Admissibility of records and transcripts; status of action

Topic Summary | Correlation Table | References

West's Key Number Digest
West's Key Number Digest, Perjury 29(3)

In a perjury prosecution, the record or transcript of the case or proceeding in which the perjury was allegedly committed is admissible to identify the case or proceeding.[1] Such evidence may include, for instance, the pleadings,[2] the rulings of the court, and the court's instructions.[3]

Although evidence of the result of the trial at which the perjury is alleged to have been committed is not admissible to show the truth or falsity of the statement in question,[4] nevertheless, the judgment in the action may be admissible to show the pendency of such action, the jurisdiction of the court, the giving of the perjurious testimony, and its materiality.[5]

Observation:
Evidence of testimony actually given at the prior proceeding must be offered for the sole purpose of showing the materiality of the false testimony alleged to have been given by the accused and must be carefully limited to that purpose.[6]

The testimony of a court clerk and court reporter is admissible with regard to the circumstances of the accused's allegedly perjurious testimony in prior proceedings.[7]

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Practice Tip:

Testimony taken before a grand jury is admissible in a prosecution for perjury.[8]

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Footnotes

1 State v. Fantasia, 5 Conn. App. 552, 500 A.2d 968 (1985); State v. Thompson, 254 Iowa 331, 117 N.W.2d 514 (1962).

2 Edwards v. State, 71 Tex. Crim. 417, 160 S.W. 709 (1913).

3 State v. Thompson, 254 Iowa 331, 117 N.W.2d 514 (1962).

4 Gray v. State, 1910 OK CR 192, 4 Okla. Crim. 292, 111 P. 825 (1910); State v. Burns, 120 S.C. 523, 113 S.E. 351, 25 A.L.R. 414 (1922).

5 People v. Bradbury, 155 Cal. 808, 103 P. 215 (1909); Spearman v. State, 68 Tex. Crim. 449, 152 S.W. 915 (1912).

6 State v. Vandemark, 77 Conn. 201, 58 A. 715 (1904); People v. Niles, 300 Ill. 458, 133 N.E. 252, 37 A.L.R. 1284 (1921).

7 § 57.

8 State v. Hennigan, 404 So. 2d 222 (La. 1981).

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IV. Prosecution of Case; Practice and Procedure

C. Proof; Evidence and Witnesses

2. Admissibility of Evidence

§ 64. Admissibility of documentary or written testimony

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 29(3)

In a perjury prosecution, documentary or written testimony may be admitted in evidence for the purpose of proving the falsity or materiality of the defendant's statements or testimony.[1] Thus, where the falsity can be proved by the defendant's own transactions or by documents emanating from him or her, such evidence may take the place of a living witness.[2] The documentary evidence, however, must be clear and positive.[3]

CUMULATIVE SUPPLEMENT

Cases:

Defendant's convictions for perjury in the second degree, offering a false instrument for filing in the first degree, and making an apparently sworn false statement in the first degree, arising from allegation that he falsely stated on pistol permit application that he had not been terminated from the armed forces "for cause," were not against the weight of the evidence; there was proof that defendant's discharge from Marines was the result of his unauthorized and unlawful leave of absence and that he acknowledged his guilt in his request for separation and that discharge was "under other than honorable conditions." N.Y. Penal Law §§ 175.35(1), 210.10, 210.40. People v. Nunez, 160 A.D.3d 1227, 75 N.Y.S.3d 333 (3d Dep't 2018).

[END OF SUPPLEMENT]

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Footnotes

[1] Com. v. Robinson, 332 Pa. Super. 147, 480 A.2d 1229 (1984).

[2] Radomsky v. U.S., 180 F.2d 781 (9th Cir. 1950); People v. O'Donnell, 132 Cal. App. 2d 840, 283 P.2d 714 (2d Dist. 1955).

[3] Com. v. Robinson, 332 Pa. Super. 147, 480 A.2d 1229 (1984).

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IV. Prosecution of Case; Practice and Procedure

C. Proof; Evidence and Witnesses

3. Weight and Sufficiency of Evidence

§ 65. Circumstantial evidence

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 29(.5)

A.L.R. Library

Conviction of perjury where one or more of elements is established solely by circumstantial evidence, 88 A.L.R.2d 852

In some jurisdictions, circumstantial evidence alone is not sufficient to sustain a conviction of perjury; there must be positive and direct evidence.[1] An exception to this rule exists where the subject matter of the falsity is not susceptible of direct proof, as where the perjurious statements involved are of opinion, belief, or memory,[2] and where the defendant has made contradictory statements under oath,[3] circumstantial evidence may suffice to prove that one of the statements was false.[4] In addition, willfulness, or knowledge of the falsity of a statement, may be inferred from circumstantial evidence,[5] and in appropriate circumstances, the defendant's belief in the falsity of his or her testimony may be inferred from proof of the statement's falsity.[6]

On the other hand, there is authority completely rejecting the theory as to the exceptional proof required in perjury cases, placing the offense on a plane with other crimes, and under this view, perjury may be proved by circumstantial evidence sufficient to show guilt beyond a reasonable doubt.[7]

A false claim of lack of recall before a grand jury may be proved through circumstantial evidence of any sort.[8]

Under the federal false-declarations statute, proof of the falsity of a statement may be made from circumstantial evidence.[9]

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Footnotes

1 Vuckson v. U.S., 354 F.2d 918 (9th Cir. 1966); People v. Roubus, 65 Cal. 2d 218, 53 Cal. Rptr. 281, 417 P.2d 865 (1966); State v. Anthoine, 2002 ME 22, 789 A.2d 1277 (Me. 2002); State v. Singh, 167 Wash. App. 971, 275 P.3d 1156 (Div. 3 2012).

2 U.S. v. Cook, 497 F.2d 753 (9th Cir. 1972); State v. Anthoine, 2002 ME 22, 789 A.2d 1277 (Me. 2002); State v. Shoemaker, 277 Or. 55, 559 P.2d 498 (1977); In re Disciplinary Proceedings Against Huddleston, 137 Wash. 2d 560, 974 P.2d 325 (1999).

3 § 60.

4 Com. v. Russo, 177 Pa. Super. 470, 111 A.2d 359 (1955).

5 U.S. v. Magin, 280 F.2d 74 (7th Cir. 1960); State v. Fantasia, 5 Conn. App. 552, 500 A.2d 968 (1985); State v. McCaslin, 240 Neb. 482, 482 N.W.2d 558 (1992).

6 State v. Fantasia, 5 Conn. App. 552, 500 A.2d 968 (1985).

7 U.S. v. Conley, 186 F.3d 7, 52 Fed. R. Evid. Serv. 785 (1st Cir. 1999); Murphy v. U.S., 670 A.2d 1361 (D.C. 1996); State v. Sands, 123 N.H. 570, 467 A.2d 202, 37 A.L.R.4th 904 (1983); People v. Rosner, 67 N.Y.2d 290, 502 N.Y.S.2d 678, 493 N.E.2d 902 (1986).

8 U.S. v. Barnhart, 889 F.2d 1374 (5th Cir. 1989).

9 U.S. v. Kelly, 540 F.2d 990 (9th Cir. 1976).

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IV. Prosecution of Case; Practice and Procedure

C. Proof; Evidence and Witnesses

3. Weight and Sufficiency of Evidence

§ 66. Requirement of two witnesses or corroboration

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Criminal Law 507(9)

West's Key Number Digest, Perjury 34(1)

A.L.R. Library

Right of defendant in prosecution for perjury to have the "two witnesses, or one witness and corroborating circumstances," rule included in charge to jury—state cases, 41 A.L.R.5th 1

Two-witness rule in perjury prosecutions under 18 U.S.C.A. sec. 1621, 49 A.L.R. Fed. 185

According to the "two-witness rule," which is derived from common law,[1] for purposes of a perjury prosecution, proof of the falsity of the defendant's testimony cannot be established beyond a reasonable doubt by the uncorroborated testimony of a single witness.[2] To prove that a defendant gave false testimony in violation of a perjury statute, the government must provide either the testimony of two witnesses[3] or the testimony of one witness and sufficient corroborative evidence.[4] An exception to this rule exists where the alleged falsity is in the belief or the memory of the defendant, and in such case, the falsity may be proved by circumstantial evidence alone, and the evidence need not conform to the two-witness rule.[5] In other words, where the objective falsity of the defendant's statement depends upon the defendant's subjective state of mind and therefore is incapable of direct proof, the two-witness rule does not apply.[6]

The defendant in a perjury prosecution is entitled to have the jury instructed on the two-witness rule,[7] and the trial court's failure to give such an instruction constitutes a reversible error.[8]

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Practice Tip:

Under the federal false-declarations statute, proof beyond a reasonable doubt is sufficient for conviction, and it will not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.[9] Thus, it is not necessary to corroborate the statements of a witness testifying to the falsity of statements made under oath.[10] Nor does the two-witness rule apply under the statute making perjury subject to punishment by court-martial[11] where the falsity of an accused's oath is directly disproved by documentary or written testimony springing from the accused, with circumstances showing corrupt intent, or by public record, proved to have been well known to the defendant when he or she took the oath.[12]

Observation:

Under the Model Penal Code, a person may not be convicted of perjury where proof of the falsity of a statement rests solely upon contradiction by testimony of a single person other than the defendant.[13]

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Footnotes

1 Hale v. State, 648 So. 2d 531, 41 A.L.R.5th 801 (Miss. 1994).

2 U.S. v. Stewart, 433 F.3d 273, 69 Fed. R. Evid. Serv. 185 (2d Cir. 2006); U.S. v. DeZarn, 157 F.3d 1042, 1998 FED App. 0309P (6th Cir. 1998); U.S. v. Chaplin, 25 F.3d 1373 (7th Cir. 1994); Murphy v. U.S., 670 A.2d 1361 (D.C. 1996); State v. Singh, 167 Wash. App. 971, 275 P.3d 1156 (Div. 3 2012).

3 People v. Ellsworth, 15 P.3d 1111 (Colo. App. 2000); Walker v. State, 314 Ga. App. 714, 725 S.E.2d 771 (2012); Edelen v. State, 947 N.E.2d 1024 (Ind. Ct. App. 2011); Ford v. State, 956 So. 2d 301 (Miss. Ct. App. 2006); State v. Jarrett, 304 S.W.3d 151 (Mo. Ct. App. S.D. 2009); State v. Denny, 361 N.C. 662, 652 S.E.2d 212 (2007); In re Ullman, 2010 PA Super 76, 995 A.2d 1207 (2010), appeal denied, 610 Pa. 600, 20 A.3d 489 (2011); State v. Hutchins, 178 Vt. 551, 2005 VT 47, 878 A.2d 241 (2005); Fritter v. Com., 45 Va. App. 345, 610 S.E.2d 887 (2005).

4 People v. Ellsworth, 15 P.3d 1111 (Colo. App. 2000); State v. Meehan, 260 Conn. 372, 796 A.2d 1191 (2002); Walker v. State, 314 Ga. App. 714, 725 S.E.2d 771 (2012); Edelen v. State, 947 N.E.2d 1024 (Ind. Ct. App. 2011); Ford v. State, 956 So. 2d 301 (Miss. Ct. App. 2006); State v. Denny, 361 N.C. 662, 652 S.E.2d 212 (2007); In re Ullman, 2010 PA Super 76, 995 A.2d 1207 (2010), appeal denied, 610 Pa. 600, 20 A.3d 489 (2011); State v. Hutchins, 178 Vt. 551, 2005 VT 47, 878 A.2d 241 (2005); Fritter v. Com., 45 Va. App. 345, 610 S.E.2d 887 (2005).
As to the required corroborating evidence, see § 67.

5 U.S. v. DeZarn, 157 F.3d 1042, 1998 FED App. 0309P (6th Cir. 1998); In re Disciplinary Proceedings Against Huddleston, 137 Wash. 2d 560, 974 P.2d 325 (1999).

6 U.S. v. Benner, 442 Fed. Appx. 417 (11th Cir. 2011).

7 Weiler v. U.S., 323 U.S. 606, 65 S. Ct. 548, 89 L. Ed. 495, 156 A.L.R. 496 (1945); State v. Betts, 71 Ariz. 362, 227 P.2d 749 (1951).

8 Nash v. State, 244 Miss. 857, 147 So. 2d 499 (1962); People v. Hicks, 11 A.D.2d 1076, 206 N.Y.S.2d 640 (2d Dep't 1960).

[9] 18 U.S.C.A. § 1623(e).

[10] U.S. v. Devitt, 499 F.2d 135 (7th Cir. 1974); U.S. v. Jessee, 605 F.2d 430 (9th Cir. 1979); U.S. v. Pearce, 428 F. Supp. 1328 (E.D. Pa. 1977).

[11] 10 U.S.C.A. § 931.

[12] U.S. v. Jordan, 20 M.J. 977 (A.C.M.R. 1985).

[13] Model Penal Code § 241.1(6).

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3. Weight and Sufficiency of Evidence

§ 67. Requirement of two witnesses or corroboration—Corroborating evidence, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Criminal Law 507(9)

West's Key Number Digest, Perjury 34(2) to 34(6)

Under the two-witness rule, a conviction may be had on the evidence of one witness supported by proof of independent corroborating circumstances.[1] The necessity for corroboration refers only to proof of the falsity of what was said and not to proof of the other elements of the crime.[2]

The corroboration of a single witness in a perjury prosecution may be by circumstantial evidence.[3]

To be admissible, the corroborative evidence must be independent of the testimony of the same witness who is the source of the direct evidence.[4]

CUMULATIVE SUPPLEMENT

Cases:

Testimony of police officer who stopped truck in which defendant was riding, in addition to dashcam video recording of the stop, was sufficient to support defendant's conviction for perjury based on her false testimony at her fiance's driving under the influence (DUI) trial, in which she testified that she and her fiance switched seats in the nine seconds from the moment the truck came to a stop and officer approached the truck; officer was a witness with direct knowledge of who was driving the truck, and the video recording of the traffic stop was independent and corroborative of officer's testimony, which together provided trial court, as finder of fact in bench trial proceeding, the evidence necessary to find that defendant knowingly offered false testimony at her fiance's trial. Mason v. State, 225 Md. App. 467, 126 A.3d 129 (2015).

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Footnotes

1 § 66.

2 U.S. v. Davis, 548 F.2d 840 (9th Cir. 1977); U.S. v. Haldeman, 559 F.2d 31, 1 Fed. R. Evid. Serv. 1203 (D.C. Cir. 1976); Mitchell v. State, 359 So. 2d 906 (Fla. 2d DCA 1978); Springer v. State, 721 S.W.2d 510 (Tex. App. Houston 14th Dist. 1986), petition for discretionary review refused, (Mar. 18, 1987).

3 U.S. v. Davis, 548 F.2d 840 (9th Cir. 1977); State v. Meehan, 260 Conn. 372, 796 A.2d 1191 (2002); Boney v. U. S., 396 A.2d 984 (D.C. 1979); In re Ullman, 2010 PA Super 76, 995 A.2d 1207 (2010), appeal denied, 610 Pa. 600, 20 A.3d 489 (2011) (in the event of one witness and circumstantial evidence, the circumstantial evidence must fit together so tightly as to preclude any reasonable doubt of guilt).

4 State v. Scanlon, 174 Mont. 139, 178 Mont. 498, 569 P.2d 368 (1976).

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IV. Prosecution of Case; Practice and Procedure

C. Proof; Evidence and Witnesses

3. Weight and Sufficiency of Evidence

§ 68. Requirement of two witnesses or corroboration—Sufficiency of corroborating evidence

Topic Summary | Correlation Table | References

West's Key Number Digest
West's Key Number Digest, Perjury 34(4)

Proof of independent corroborating circumstances may support the evidence of one witness under the two-witness rule,[1] and various views have been taken as to the sufficiency of the evidence of the corroborative circumstances; one view has been expressed to the effect that the evidence must be sufficiently strong to be tantamount to the testimony of another witness,[2] and another view is that it must be sufficient to connect the accused with the perpetration of the offense.[3] In other words, where the government attempts to show perjury under the "two-witness rule" with one direct witness to the falsity of the defendant's testimony, plus independent corroborative evidence, such corroborative evidence need not be sufficient, by itself, to demonstrate guilt; rather, it needs only to tend to establish the defendant's guilt, and be inconsistent with the defendant's innocence, when joined with the one direct witness' testimony.[4]

A third view is that the evidence must be strongly corroborative of the testimony of the accusing witness,[5] that is, it must be of such character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his or her innocence and something more than the mere weight of evidence in favor of the State.[6]

Finally, the view has been taken that the corroborative evidence must be sufficiently strong to satisfy the jury beyond a reasonable doubt of the guilt of the accused[7] although there is authority holding that it need not be sufficient to independently establish the offense beyond a reasonable doubt or even by a preponderance of the evidence.[8] In other words, in a prosecution for perjury, it is sufficient if the corroborating evidence tends to establish the defendant's guilt and if such evidence together with the direct evidence is inconsistent with the innocence of the defendant.[9] Thus, independent corroborative evidence suffices if it tends to confirm the truth of the witness' testimony in material respects and thereby induces a belief in his or her testimony.[10]

It is for the jury to determine in each case the amount of corroboration that must exist,[11] and it is enough if the corroborating circumstances, although slight, are ample to satisfy the jury.[12]

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CUMULATIVE SUPPLEMENT

Cases:

State satisfied corroboration requirement for perjury charge involving defendant's false testimony, at trial of her supervisor for murder of defendant's husband, that defendant and supervisor did not have a romantic relationship; state produced testimony from a bartender at a night club who saw defendant and supervisor, in the month prior to murder, at the club on the dance floor pressing their bodies together while supervisor cupped defendant's buttocks with his hands and they engaged in "passionate kiss[ing]," and state also produced corroborating circumstances in the form of romantic e-mail messages between supervisor and defendant, and evidence that they shared hotel rooms on out-of-town business trips. West's Ga.Code Ann. §§ 16–10–70, 24–14–8. Sneiderman v. State, 336 Ga. App. 153, 784 S.E.2d 18 (2016).

Dashcam video recording taken by police officer's squad car was sufficiently corroborative of police officer's testimony so as to satisfy the "two-witness rule," requiring a perjury conviction to be supported by direct and positive testimony of two witnesses or one witness combined with other independent corroborative evidence, for purposes of determining whether evidence was sufficient to support defendant's perjury conviction, in bench-trial proceedings in which police officer and defendant offered contradictory testimony concerning a traffic stop, upon which State offered the video recording of the traffic stop tending to show that defendant and her fiance did not switch seats during the stop, as defendant claimed while testifying as a defense witness in her fiance's trial for driving under the influence (DUI); the video showing that the stopped truck did not move supported officer's testimony that there was no indication that defendant and her fiance switched seats before officer approached the truck. Mason v. State, 225 Md. App. 467, 126 A.3d 129 (2015).

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Footnotes

1 § 66.

2 Boney v. U. S., 396 A.2d 984 (D.C. 1979); State v. Tinker, 165 Vt. 548, 676 A.2d 785 (1996).

3 People v. Woodcock, 52 Cal. App. 412, 199 P. 565 (1st Dist. 1921); Hsu v. U. S., 392 A.2d 972 (D.C. 1978).

4 Murphy v. U.S., 670 A.2d 1361 (D.C. 1996).

5 Williams v. Commonwealth, 287 Ky. 570, 154 S.W.2d 563, 136 A.L.R. 1398 (1941); State v. McGee, 341 Mo. 151, 106 S.W.2d 480, 111 A.L.R. 821 (1937).

6 State v. Bulach, 10 N.J. Super. 107, 76 A.2d 692 (App. Div. 1950); State v. White, 31 Wash. App. 655, 644 P.2d 693 (Div. 1 1982).

7 Jewell v. Com., 296 Ky. 718, 178 S.W.2d 415 (1944); State v. Hill, 223 N.C. 711, 28 S.E.2d 100 (1943).

8 U.S. v. Forrest, 639 F.2d 1224 (5th Cir. 1981).

9 Brightman v. U.S., 386 F.2d 695 (1st Cir. 1967); U.S. v. Davis, 548 F.2d 840 (9th Cir. 1977).

10 U.S. v. Davis, 548 F.2d 840 (9th Cir. 1977).

11 U.S. v. Davis, 548 F.2d 840 (9th Cir. 1977); Risher v. State, 418 P.2d 983 (Alaska 1966).

12 Parham v. State, 3 Ga. App. 468, 60 S.E. 123 (1908).

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IV. Prosecution of Case; Practice and Procedure

D. Questions of Law or Fact

§ 69. Generally

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West's Key Number Digest

West's Key Number Digest, Perjury 35.1, 36

In a perjury prosecution, questions of law for the court include whether the officer administering the oath in the proceeding in which the accused allegedly committed perjury had authority to do so, whether the court that tried the case in which the alleged perjury was committed had jurisdiction thereof,[1] and whether a defendant is entitled to the benefit of the recantation defense.[2]

A determination of whether a question or statement is arguably ambiguous for perjury purposes is generally left to the jury.[3] However, there is also authority holding that whether a question that a defendant allegedly answered falsely is fundamentally ambiguous is a matter of law that appellate courts review de novo in prosecutions for perjury.[4]

Although normally an issue for the jury in a perjury prosecution, where the government's line of questioning is "fundamentally ambiguous," the answers associated with the questions posed may be insufficient as a matter of law to support the perjury conviction.[5] On the other hand, absent fundamental ambiguity or impreciseness in questioning, the truthfulness of the defendant's answers is an issue for the jury[6] as is the question whether the accused intended to commit perjury.[7]

Whether a defendant made a false statement willfully and corruptly, as required to support a conviction for perjury, is a matter for the jury to determine and not a conclusion of law.[8]

When the question posed to the witness and the witness' answer may have more than one meaning standing alone, the intended meaning is ordinarily an issue for the jury to determine from their context and other indicia of the witness' intent in giving the answer.[9]

Whether an answer is literally true, for purposes of a perjury claim, is also a factual question for the jury.[10] In the context of a perjury charge, a full exploration of the context of the questioning and responses, the state of mind of the declarant, and whether the answers were literally truthful are inherently jury submissible questions of fact.[11]

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Footnotes

1 State v. Richardson, 248 Mo. 563, 154 S.W. 735 (1913).

2 § 72.

3 U.S. v. Brooks, 681 F.3d 678 (5th Cir. 2012), cert. denied, 133 S. Ct. 836, 184 L. Ed. 2d 652 (2013) and cert. denied, 133 S. Ct. 837, 184 L. Ed. 2d 652 (2013) and cert. denied, 133 S. Ct. 839, 184 L. Ed. 2d 652 (2013); U.S. v. Culliton, 328 F.3d 1074 (9th Cir. 2003); U.S. v. Hughson, 488 F. Supp. 2d 835 (D. Minn. 2007).

4 Furda v. State, 421 Md. 332, 26 A.3d 918 (2011), cert. denied, 132 S. Ct. 2376, 182 L. Ed. 2d 1025 (2012).

5 U.S. v. Cicalese, 863 F. Supp. 2d 231 (E.D. N.Y. 2012) (stating that a question is fundamentally ambiguous if it pivots on a phrase that is not a phrase with a meaning about which men of ordinary intellect could agree).

6 U.S. v. Schafrick, 871 F.2d 300 (2d Cir. 1989).

7 U.S. v. Hamilton, 3 Fed. Appx. 7 (2d Cir. 2001); State v. Hawkins, 620 N.W.2d 256 (Iowa 2000).

8 State v. Denny, 361 N.C. 662, 652 S.E.2d 212 (2007).

9 U.S. v. Williams, 536 F.2d 1202 (7th Cir. 1976); State v. Douglas, 217 Neb. 199, 349 N.W.2d 870 (1984).

10 U.S. v. Hamilton, 3 Fed. Appx. 7 (2d Cir. 2001).

11 U.S. v. Hughson, 488 F. Supp. 2d 835 (D. Minn. 2007).

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IV. Prosecution of Case; Practice and Procedure

D. Questions of Law or Fact

§ 70. Materiality

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West's Key Number Digest

West's Key Number Digest, Perjury 35.1, 36

A.L.R. Library

Materiality of testimony forming basis of perjury charge as question for court or jury in state trial, 37 A.L.R.4th 948

Materiality is an element of the crime of perjury, and as such, its proof beyond a reasonable doubt must be determined by the trier of fact.[1] Accordingly, in a perjury prosecution, the question of the materiality of false testimony must be decided by the jury, not the court.[2]

However, there is authority holding that the materiality of false testimony is a matter of law for determination by the court in a prosecution of perjury rather than a factual question for determination by the jury.[3] Also, in a criminal prosecution where the defendant is charged with perjury under a state perjury statute, materiality is not an element of the crime, and it is not submitted to the jury; rather, the trial court is to determine as a matter of law if the alleged false testimony or writing was on a material matter.[4] Moreover, where there is no dispute as to what the testimony of the party charged with perjury was upon a certain issue presented to a court of competent jurisdiction, then it is purely a question of law for the trial court to determine whether such testimony as given was material to the issue thus presented.[5]

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Footnotes

[1] U.S. v. Gonzalez, 718 F. Supp. 2d 1341, 82 Fed. R. Evid. Serv. 991 (S.D. Fla. 2010); People v. Kobrin, 11 Cal. 4th 416, 45 Cal. Rptr. 2d 895, 903 P.2d 1027 (1995).

[2] U.S. v. Sarihifard, 155 F.3d 301 (4th Cir. 1998); U.S. v. Durham, 139 F.3d 1325 (10th Cir. 1998); U.S. v. Hughson, 488 F. Supp. 2d 835 (D. Minn. 2007); State v. Paige, 304 Conn. 426, 40 A.3d 279 (2012); Walker v. State, 314 Ga. App. 714, 725 S.E.2d 771 (2012); People v. Lively, 470 Mich. 248, 680 N.W.2d 878 (2004); State v. Neal, 361 N.J. Super. 522, 826 A.2d 723 (App. Div. 2003); People v. Perino, 19 N.Y.3d 85, 945 N.Y.S.2d 602, 968 N.E.2d 956 (2012); State v. Danielson, 2012 SD 36, 814 N.W.2d 401 (S.D. 2012); Teague v. State, 268 S.W.3d 664 (Tex. App. Fort Worth 2008), petition for discretionary review refused, (Feb. 4, 2009).

[3] State v. King, 94 So. 3d 203 (La. Ct. App. 2d Cir. 2012), writ denied, 117 So. 3d 1260 (La. 2013); Hammett v. State, 797 So. 2d 258 (Miss. Ct. App. 2001).

[4] Vargas v. State, 795 So. 2d 270 (Fla. 3d DCA 2001) (materiality is not an element of the crime of perjury but is a threshold issue that a court must determine as a matter of law prior to trial); State v. Tyler, 237 P.3d 668 (Kan. Ct. App. 2010), unpublished.

[5] March v. Midwest St. Louis, L.L.C., 2012 WL 4499046 (Mo. Ct. App. E.D. 2012), reh'g and/or transfer denied, (Nov. 13, 2012) (also holding that the materiality of the testimony on which perjury is assigned must be established by evidence and cannot be left to presumption or inference).

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V. Defenses; Effect of Immunity and Privilege Provisions

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V. Defenses; Effect of Immunity and Privilege Provisions

§ 71. Generally

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Truth is always a complete defense to a charge of perjury unless the witness did not really believe that he or she was telling the truth.[1] Similarly, impairment of memory is a defense to a perjury charge,[2] and so is a belief that the facts sworn to are true.[3]

"Perjury trap," which is a violation of due process amounting to outrageous prosecutorial conduct, is a complete defense to perjury.[4] A perjury trap is shown where the prosecutor exhibits no palpable interest in eliciting facts material to the substantive investigation of a crime or official misconduct and substantially tailors his or her questioning to extract false answers.[5]

Practice Tip:

To prevail on a perjury-trap defense, the defendant must prove that his or her testimony did not further the purpose of the proceeding and that the prosecutor's questions were designed solely to entrap him or her into giving false answers.[6] A defendant cannot succeed on a theory of a perjury trap when the questions relate to a legitimate parallel investigation.[7]

Although the absolute privilege for statements made in connection with litigation immunizes a defamer from a civil-damage action, the privilege does not protect a witness or party who testifies falsely from perjury prosecution.[8]

Observation:

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Under the Model Penal Code, it is not a defense to a perjury prosecution that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not competent to make the statement. A document purporting to be made upon oath or affirmation at any time when the actor presents it as being so verified may be deemed to have been duly sworn or affirmed.[9]

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Footnotes

1 U.S. v. Chaplin, 25 F.3d 1373 (7th Cir. 1994); Richards v. State, 131 Ga. App. 362, 206 S.E.2d 93 (1974).

2 Leaptrot v. State, 51 Fla. 57, 40 So. 616 (1906).

3 § 22.

4 State v. Tonzola, 159 Vt. 491, 621 A.2d 243 (1993).

5 U.S. v. Regan, 103 F.3d 1072 (2d Cir. 1997); State v. Tonzola, 159 Vt. 491, 621 A.2d 243 (1993).

6 U.S. v. Peterson, 544 F. Supp. 2d 1363 (M.D. Ga. 2008); State v. Wheel, 155 Vt. 587, 587 A.2d 933 (1990).

7 U.S. v. Scrushy, 366 F. Supp. 2d 1134 (N.D. Ala. 2005).

8 Hawkins v. Harris, 141 N.J. 207, 661 A.2d 284 (1995); Kirschstein v. Haynes, 1990 OK 8, 788 P.2d 941 (Okla. 1990). As to protection, by an absolute privilege, of testimony given in a judicial proceeding, see Am. Jur. 2d, Libel and Slander § 292.

9 Model Penal Code § 241.1(3).

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§ 72. Recantation, withdrawal, or correction of false testimony

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Recantation as defense in perjury prosecution, 64 A.L.R.2d 276

False testimony given under oath does not furnish a basis for perjury or false swearing if such testimony is the result of an innocent mistake or inadvertent omission on the part of the witness.[1] Thus, as a general rule, the defendant's correction or attempted correction of testimony before the tribunal in which he or she originally appeared is of some value in showing that the defendant was mistaken in giving his or her former statements, or that he or she inadvertently omitted significant evidence when first testifying, so as to support the conclusion that he or she did not willfully intend to testify falsely.[2]

A difference of opinion arises when the witness has made an intentionally false statement and later seeks to alter it, some jurisdictions holding that if the witness recants within an appropriate time and under satisfactory circumstances, and tells the truth to the tribunal before which he or she originally appeared, then he or she has not committed the offense of perjury or false swearing.[3] In other words, under this view, recantation is a defense to a charge of perjury if: (1) the recantation occurred promptly and voluntarily; (2) the defendant gained nothing from the false statement; (3) no one was prejudiced by it; (4) judicial proceedings were not affected by it; and (5) any subsequent testimony from the defendant was consistent with the recanted testimony.[4]

Observation:

Under statutes requiring that retraction must occur before exposure of the falsification becomes manifest to the witness, the defendant must retract his or her testimony before he or she would know or has reason to know that the authorities are or will be aware of the falsification.[5] The crucial matter is the defendant's motive in retracting.[6]

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In other jurisdictions, the rule is that once an intentionally false statement has been made by a witness testifying under oath before a tribunal, any subsequent recantation or correction by him or her is ineffective since the criminal offense of perjury or false swearing has already been committed.[7]

Observation:

Under the Model Penal Code, a person is not guilty of perjury if he or she retracted the false statement in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before it substantially affected the proceeding.[8]

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Footnotes

1 § 22.

2 People v. Baranov, 201 Cal. App. 2d 52, 19 Cal. Rptr. 866 (4th Dist. 1962); People v. Hamby, 6 Ill. 2d 559, 129 N.E.2d 746 (1955).

3 State v. Hawkins, 620 N.W.2d 256 (Iowa 2000) (as a matter of law, a defendant's mere dismissal of a postconviction proceeding during which he gave false testimony, without more, did not amount to a taking back or disavowal of testimony required to satisfy the retraction element of the statutory defense to a perjury charge); People v. Ezaugi, 2 N.Y.2d 439, 161 N.Y.S.2d 75, 141 N.E.2d 580, 64 A.L.R.2d 271 (1957).

4 State v. Snipes, 433 So. 2d 653 (Fla. 1st DCA 1983).

5 Nelson v. State, 500 So. 2d 1308 (Ala. Crim. App. 1986); State v. Hanson, 302 N.W.2d 399 (N.D. 1981).

6 State v. Hanson, 302 N.W.2d 399 (N.D. 1981).

7 State v. Phillips, 175 Kan. 50, 259 P.2d 185 (1953); Callier v. Warden, Nevada Women's Correctional Center, 111 Nev. 976, 901 P.2d 619 (1995).

8 Model Penal Code § 241.1(4).

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§ 73. Recantation, withdrawal, or correction of false testimony—Federal perjury statute

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Under the general federal perjury statute,[1] recantation is relevant only in showing the absence of an intent to commit perjury.[2] It does not excuse the initial perjury[3] as it may under the specific provisions of the federal false-declarations statute.[4] Thus, the offense of perjury is complete when the intentionally false statement is made,[5] and the statement cannot be corrected.[6]

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Footnotes

1 18 U.S.C.A. § 1621.

2 U.S. v. Kahn, 472 F.2d 272 (2d Cir. 1973); U.S. v. McAfee, 8 F.3d 1010 (5th Cir. 1993).

3 U.S. v. Kahn, 472 F.2d 272 (2d Cir. 1973); U.S. v. McAfee, 8 F.3d 1010 (5th Cir. 1993).

4 § 74.

5 Meyers v. U.S., 171 F.2d 800, 11 A.L.R.2d 1 (D.C. Cir. 1948); U.S. v. DeVaughn, 414 F. Supp. 774 (D. Md. 1976), aff'd, 556 F.2d 575 (4th Cir. 1977).

6 U.S. v. Kahn, 472 F.2d 272 (2d Cir. 1973); Meyers v. U.S., 171 F.2d 800, 11 A.L.R.2d 1 (D.C. Cir. 1948).

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§ 74. Recantation, withdrawal, or correction of false testimony—Federal false-declarations statute

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Recantation as bar to perjury prosecution under 18 U.S.C.A. sec. 1623(d), 65 A.L.R. Fed. 177

Under the federal false-declarations statute, where, in the same continuous court or grand jury proceeding in which a declaration is made, the declarant admits that the declaration is false, such admission will bar prosecution under the statute if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.[1] Thus, under the statute, the effect of recantation is not to erase the lie but rather to erect a bar to prosecution when the statutory requirements have been met.[2] The core purpose of this recantation provision contained in the federal false-declarations statute is to encourage truthful testimony.[3]

Practice Tip:

Whether a witness' recantation satisfies the requirements is a question of law for the court.[4]

In order to effectively recant a prior perjurious statement, the declarant must make an outright retraction and repudiation, and he or she also must explain unambiguously and specifically the respects in which his or her earlier answer was false.[5] In other

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words, in order to establish a recantation defense to a perjury charge, the defendant must unequivocally repudiate his or her prior testimony, and it is not enough if the defendant merely attempted to explain his or her inconsistent statements but never really admitted to the facts in question.[6] Thus, a defendant's entry of a guilty plea does not effectively recant prior false testimony where, during the hearing in which the plea is accepted by the court, the defendant admits his or her guilt but does not specifically state that any part of his or her testimony was false.[7]

Practice Tip:

A witness who has made a false declaration is not entitled to a warning that he or she has a "right" to recant[8] or that the time to avail him- or herself of this "right" is running out.[9]

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Cases:

Defendant failed to show that she had lacked a reasonable legal alternative to giving false testimony, as element for a duress defense, in prosecution for making a false material declaration before a grand jury, relating to unlawful gun possession by a man living with defendant's daughter; defendant could have reported to law enforcement officers the alleged threats she faced if she testified truthfully to grand jury. 18 U.S.C.A. § 1623. United States v. Myles, 962 F.3d 384 (8th Cir. 2020).

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1 18 U.S.C.A. § 1623(d).

2 U.S. v. Goguen, 723 F.2d 1012, 14 Fed. R. Evid. Serv. 1315 (1st Cir. 1983); U. S. v. D'Auria, 672 F.2d 1085, 10 Fed. R. Evid. Serv. 106 (2d Cir. 1982); U.S. v. Denison, 508 F. Supp. 659 (M.D. La. 1981), judgment aff'd, 663 F.2d 611, 65 A.L.R. Fed. 165 (5th Cir. 1981); U.S. v. Tucker, 495 F. Supp. 607 (E.D. N.Y. 1980).

3 U.S. v. Sebaggala, 256 F.3d 59, 57 Fed. R. Evid. Serv. 484 (1st Cir. 2001).

4 U.S. v. Goguen, 723 F.2d 1012, 14 Fed. R. Evid. Serv. 1315 (1st Cir. 1983); U. S. v. D'Auria, 672 F.2d 1085, 10 Fed. R. Evid. Serv. 106 (2d Cir. 1982).

5 U.S. v. Sebaggala, 256 F.3d 59, 57 Fed. R. Evid. Serv. 484 (1st Cir. 2001); Precision Window Mfg., Inc. v. N.L.R.B., 963 F.2d 1105 (8th Cir. 1992).

6 U.S. v. Wiggan, 700 F.3d 1204 (9th Cir. 2012).

7 U.S. v. Scivola, 766 F.2d 37 (1st Cir. 1985).

8 U.S. v. Cuevas, 510 F.2d 848 (2d Cir. 1975); U.S. v. Lardieri, 506 F.2d 319 (3d Cir. 1974); U.S. v. Anfield, 539 F.2d 674 (9th Cir. 1976).

[9] U. S. v. D'Auria, 672 F.2d 1085, 10 Fed. R. Evid. Serv. 106 (2d Cir. 1982); U.S. v. Denison, 663 F.2d 611, 65 A.L.R. Fed. 165 (5th Cir. 1981).

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V. Defenses; Effect of Immunity and Privilege Provisions

§ 75. Double jeopardy

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When a criminal defendant testifies falsely at trial and is subsequently charged with perjury, double jeopardy is not a defense to the perjury charge where perjury is not the same offense as the crime for which the defendant was prosecuted at the first trial.[1] This is true, whether or not the defendant was acquitted of the substantive offense.[2]

However, the double jeopardy clause does not permit the defendant to be convicted and sentenced for both perjury in an official proceeding and providing false information in an application for bail, arising out of a single lie; even though those offenses are denoted in separate statutory chapters, the crimes are degree variants of perjury.[3]

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Footnotes

1 Com. v. Hude, 492 Pa. 600, 425 A.2d 313 (1980); State v. Danielson, 2010 SD 58, 786 N.W.2d 354 (S.D. 2010).

2 State v. Noble, 2 Ariz. App. 532, 410 P.2d 489 (1966).

3 State v. Anderson, 695 So. 2d 309 (Fla. 1997).

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§ 76. Double jeopardy—Prior prosecution for perjury in separate proceedings of same action

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West's Key Number Digest

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Where one indictment charges perjury for testimony given before a grand jury, and a second indictment charges perjury for testimony given at the subsequent trial, double jeopardy does not directly preclude a trial on the second indictment following the dismissal of the original indictment since different episodes of perjury are involved in the two indictments.[1]

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Footnotes

[1] DeMan v. State, 677 P.2d 903 (Alaska Ct. App. 1984).

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§ 77. Collateral estoppel by prior prosecution

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West's Key Number Digest

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A.L.R. Library

Acquittal as bar to prosecution of accused for perjury committed at trial, 89 A.L.R.3d 1098

Although traditional principles of double jeopardy do not preclude a prosecution for perjury committed in a former trial, whether or not the defendant was acquitted of the substantive offense,[1] the issue-preclusion doctrine of collateral estoppel, as an aspect of the constitutional protection against double jeopardy, may bar a subsequent perjury prosecution.[2]

In ruling whether collateral estoppel precludes a perjury prosecution subsequent to an acquittal or implied acquittal on the substantive offense, it must be determined whether an issue necessary for the prosecution's case in the second trial has necessarily been decided in the defendant's favor in the first trial. That is, the defendant must show that the prosecution of the perjury charge would necessarily require the relitigation of material fact issues, which were definitely determined in the defendant's favor at the former trial.[3] Collateral estoppel applies to a perjury prosecution for testimony at a prior trial not only where the testimony relates to an issue that was an essential element of the crime itself but also where it relates to any peripheral matters that must have been adjudicated and considered in order to reach the verdict.[4]

Observation:

Unless the record of the prior proceeding affirmatively demonstrates that an issue involved in the perjury trial was definitely determined in the former trial, the possibility that it might have been does not prevent the relitigation of that issue since the jury could have disbelieved the defendant's testimony as to that issue and still reached a verdict of acquittal.[5]

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The doctrine of collateral estoppel does not bar the State from prosecuting a defendant, who had been acquitted of an earlier murder charge, for perjury, based on a later statement by the defendant contradicting his sworn testimony at the murder trial, where: (1) the State had obtained new and additional evidence that the defendant lied under oath; and (2) such evidence was sufficient to permit the jury to conclude beyond a reasonable doubt that perjury had been committed.[6]

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Footnotes

1 § 75.

2 DeMan v. State, 677 P.2d 903 (Alaska Ct. App. 1984); Com. v. Hude, 492 Pa. 600, 425 A.2d 313 (1980).

3 U.S. v. Brown, 547 F.2d 438, 1 Fed. R. Evid. Serv. 614 (8th Cir. 1977); U.S. v. Sarno, 596 F.2d 404 (9th Cir. 1979); Boyles v. State, 647 P.2d 1113 (Alaska Ct. App. 1982); State v. Conway, 1983 OK CR 49, 661 P.2d 1355 (Okla. Crim. App. 1983).

4 U.S. v. Drevetzki, 338 F. Supp. 403 (N.D. Ill. 1972).

5 U.S. v. Haines, 485 F.2d 564 (7th Cir. 1973); U.S. v. Kramer, 73 F.3d 1067 (11th Cir. 1996); State v. DeSchepper, 304 Minn. 399, 231 N.W.2d 294, 89 A.L.R.3d 1084 (1975); State v. Hutchins, 144 N.H. 669, 746 A.2d 447 (2000).

6 State v. Bolden, 639 So. 2d 721 (La. 1994).

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§ 78. Advice of counsel

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Although a defendant's reliance on the advice of his or her attorney as the basis for making an allegedly perjurious statement may be important as bearing on whether the defendant made the statement with a corrupt motive,[1] it is well established that where the matter testified to is purely one of fact, the defendant cannot be permitted to prove that he or she acted under legal advice,[2] especially when it does not appear that he or she truly stated the facts to the attorney.[3]

Observation:

It is of no comfort to the defendant that he or she relies on his or her attorney's mistaken memory as the basis for testimony, where the substance of the testimony concerns a fact situation instead of a question of law, since mere reliance on an attorney's advice does not transform a matter of fact into a question of law.[4]

However, an allegedly perjurious statement will not sustain a charge of perjury when its truth or falsity is a mixed question of law and fact and when the accused swears to the statement in reliance on his or her attorney's advice and in the belief that his or her attorney has correctly advised him or her as a matter of law that it is the truth provided the accused first gives his or her attorney the facts fully and in good faith.[5]

CUMULATIVE SUPPLEMENT

Cases:

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Defense counsel did not make good faith determination, rooted in objective facts, that defendant, who invoked his right to testify against advice of counsel, was going to give false testimony, as required to invoke rule obligating counsel to disclose same, as prerequisite to restricting defendant's testimony to narrative form, without direction of counsel, in trial for first-degree murder; rather, counsel merely stated that he felt uneasy about questioning defendant directly based on what counsel anticipated defendant's testimony to be, but that he would never vouch for credibility of any witness, and when defendant rejected defense counsel's advice to remain silent, counsel either should have determined what defendant wanted to tell jury and then guided defendant's testimony accordingly via direct examination, or made necessary representations in accordance with rule. Mass. R. Prof. Conduct 3.3(e). Commonwealth v. Miranda, 484 Mass. 799, 146 N.E.3d 435 (2020).

[END OF SUPPLEMENT]

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Footnotes

[1] Beckanstin v. U.S., 232 F.2d 1 (5th Cir. 1956); U.S. v. Becker, 203 F. Supp. 467 (E.D. Va. 1962); Cosio v. State, 106 Nev. 327, 793 P.2d 836 (1990).

[2] State v. Fantasia, 5 Conn. App. 552, 500 A.2d 968 (1985).

[3] Williamson v. U.S., 207 U.S. 425, 28 S. Ct. 163, 52 L. Ed. 278 (1908); Stokes v. State, 59 Ga. App. 878, 2 S.E.2d 674 (1939).

[4] State v. Fantasia, 5 Conn. App. 552, 500 A.2d 968 (1985).

[5] Williamson v. U.S., 207 U.S. 425, 28 S. Ct. 163, 52 L. Ed. 278 (1908); Stokes v. State, 59 Ga. App. 878, 2 S.E.2d 674 (1939).

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§ 79. Duress, fear, or compulsion

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West's Key Number Digest

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Duress is a defense in criminal law only if the defendant reasonably fears immediate death or serious bodily injury, which can be avoided only by committing the criminal act charged.[1] Although this rule may be applicable to the offense of perjury,[2] the general rule is that a sworn false statement made under fear or compulsion in court or before a grand jury constitutes perjury since the impelling danger is not present, imminent, impending, or unavoidable.[3] Moreover, it is immaterial whether the witness appears and testifies voluntarily or under compulsion of a contempt order.[4] The fact that the accused stands to suffer adverse legal consequences from testifying truthfully, even in proceedings the accused perceives as unjust, does not warrant his or her committing perjury.[5]

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Footnotes

1 Am. Jur. 2d, Criminal Law § 144.

2 U.S. v. Nickels, 502 F.2d 1173 (7th Cir. 1974); State v. Rosillo, 282 N.W.2d 872 (Minn. 1979); Com. v. DeMarco, 570 Pa. 263, 809 A.2d 256 (2002).

3 People v. Ricker, 45 Ill. 2d 562, 262 N.E.2d 456 (1970); Hardin v. State, 85 Tex. Crim. 220, 211 S.W. 233, 4 A.L.R. 1308 (1919).

4 U.S. v. Dowdy, 440 F. Supp. 894 (W.D. Va. 1977).

5 U.S. v. Nickels, 502 F.2d 1173 (7th Cir. 1974).

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§ 80. Statutory immunity for compelled testimony

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Generally, under both federal[1] and state law, immunity for compelled testimony, given under a statute promising that no testimony given by the witness will be offered in evidence against him or her in any criminal proceeding, extends to past crimes only and does not protect against a prosecution for false testimony given when testifying under compulsion.[2] However, a witness who has been given immunity cannot later be prosecuted for perjury on the basis of an inconsistency between his or her truthful testimony under the grant of immunity and his or her false testimony in another proceeding.[3]

Observation:

The promise of immunity is premised on the assumption that the information provided by the witness will be truthful; if the information turns out to be false, there can be no immunity because the basis for its grant would be frustrated.[4]

Practice Tip:

Immunity provided under the general federal immunity statute protects a witness from the use of his or her testimony in subsequent prosecutions against him or her except for perjury.[5] Immunized testimony from one proceeding may not be used to prove perjury allegedly committed during the course of separate and earlier immunized testimony[6] although immunized testimony may be used to prove perjury allegedly committed during the course of separate and subsequent immunized testimony.[7]

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Even a witness forced to testify by a grant of immunity from prosecution for other crimes may be prosecuted criminally for perjury.[8] However, a grant of use immunity forecloses the State from prosecuting an immunized witness under the State's perjury statute based upon prior false statements.[9]

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Footnotes

1 18 U.S.C.A. §§ 1621 to 1623.

2 U.S. v. Tucker, 495 F. Supp. 607 (E.D. N.Y. 1980); DeMan v. State, 677 P.2d 903 (Alaska Ct. App. 1984); Com. v. Hawkins, 322 Pa. Super. 199, 469 A.2d 252 (1983).

3 DeMan v. State, 677 P.2d 903 (Alaska Ct. App. 1984); Rush v. Mordue, 68 N.Y.2d 348, 509 N.Y.S.2d 493, 502 N.E.2d 170 (1986).

4 Com. v. Hawkins, 322 Pa. Super. 199, 469 A.2d 252 (1983).

5 18 U.S.C.A. § 6002.

6 U.S. v. Gebhard, 426 F.2d 965 (9th Cir. 1970); U.S. v. Seltzer, 621 F. Supp. 714 (N.D. Ohio 1985).

7 U.S. v. Seltzer, 621 F. Supp. 714 (N.D. Ohio 1985).

8 Jones v. Cannon, 174 F.3d 1271 (11th Cir. 1999).

9 State v. Morales, 788 N.W.2d 737 (Minn. 2010).

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§ 81. Self-incrimination

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A.L.R. Library

Privilege against self-incrimination as to testimony before grand jury, 38 A.L.R.2d 225

The Fifth Amendment privilege against self-incrimination does not endow a witness with a license to commit perjury[1] but merely grants a privilege to remain silent without risking contempt.[2] Accordingly, testifying witnesses have two permissible choices: they can provide truthful testimony, or they can invoke the protections of the Fifth Amendment.[3] False testimony is not a permissible option,[4] and the fact that a witness voluntarily testifies to matters concerning which he or she might refuse to answer on the ground that his or her answer might tend to incriminate him or her does not constitute a defense to a charge of perjury.[5]

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Footnotes

1 Brogan v. U.S., 522 U.S. 398, 118 S. Ct. 805, 139 L. Ed. 2d 830 (1998); Martinez v. State, 91 S.W.3d 331 (Tex. Crim. App. 2002).

2 U. S. v. Wong, 431 U.S. 174, 97 S. Ct. 1823, 52 L. Ed. 2d 231 (1977).

3 U.S. v. Sarihifard, 155 F.3d 301 (4th Cir. 1998).

4 U.S. v. Sarihifard, 155 F.3d 301 (4th Cir. 1998).

5 U. S. v. Apfelbaum, 445 U.S. 115, 100 S. Ct. 948, 63 L. Ed. 2d 250 (1980); DeMan v. State, 677 P.2d 903 (Alaska Ct.

App. 1984).

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V. Defenses; Effect of Immunity and Privilege Provisions

§ 82. Self-incrimination—Right to testify

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 15

The Constitution does not provide criminal defendants with a right to commit perjury,[1] and a criminal defendant's right to testify does not include the right to commit perjury.[2] Stated otherwise, a defendant's right to take the stand at the guilt phase of his or her trial and testify on his or her own behalf does not insulate the defendant from being prosecuted for perjury if he or she lies in some material way while on the stand.[3]

Observation:

To find perjury automatically every time a defendant takes the stand and denies guilt, but is nonetheless convicted, would impinge upon the constitutional right to testify on one's own behalf, and a mere disagreement between the defendant's testimony and the jury's verdict is insufficient to support a finding of perjury.[4]

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Footnotes

1 U.S. v. Rehal, 940 F.2d 1 (1st Cir. 1991); Com. v. Roderick, 429 Mass. 271, 707 N.E.2d 1065 (1999).

2 LaChance v. Erickson, 522 U.S. 262, 118 S. Ct. 753, 139 L. Ed. 2d 695 (1998); Vaughn v. State, 931 S.W.2d 564 (Tex. Crim. App. 1996).

3 Vaughn v. State, 931 S.W.2d 564 (Tex. Crim. App. 1996).

[4] U.S. v. Weller, 238 F.3d 1215 (10th Cir. 2001).

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V. Defenses; Effect of Immunity and Privilege Provisions

§ 83. Invalid statute as basis of proceeding where perjury was committed

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 15

A.L.R. Library

Invalidity of statute or ordinance giving rise to proceeding in which false testimony was received as defense to prosecution for perjury, 34 A.L.R.3d 413

Where it is determined that the tribunal in which the alleged perjury was committed had jurisdiction of the subject matter and the person, the invalidity of the statute or ordinance is no defense to a charge of perjury.[1]

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Footnotes

[1] U.S. v. Bryson, 403 F.2d 340 (9th Cir. 1968), judgment aff'd, 396 U.S. 64, 90 S. Ct. 355, 24 L. Ed. 2d 264 (1969); State v. Forichette, 279 Minn. 76, 156 N.W.2d 93, 34 A.L.R.3d 399 (1968).

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VI. Subornation of Perjury; Attempts to Suborn Perjury

A. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Conspiracy 47(13)
West's Key Number Digest, Perjury 1, 2, 13, 14, 27, 28, 41

A.L.R. Library

A.L.R. Index, Perjury
A.L.R. Index, Subornation of Perjury
West's A.L.R. Digest, Conspiracy 47(13)
West's A.L.R. Digest, Perjury 1, 2, 13, 14, 27, 28, 41

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60A Am. Jur. 2d Perjury § 84

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VI. Subornation of Perjury; Attempts to Suborn Perjury

A. In General

§ 84. Generally; conspiracy to commit perjury

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Conspiracy 47(13)
West's Key Number Digest, Perjury 13, 27

A.L.R. Library

Criminal liability of attorney for tampering with evidence, 49 A.L.R.5th 619

Although there is authority holding that subornation of perjury is only a particular form of perjury, or is, in substance, the same as perjury,[1] in most jurisdictions and under federal law,[2] it is declared by statute to be an offense separate and distinct from perjury.[3]

Definition:

To suborn perjury, a party, acting with the intent to promote or assist a witness in committing perjury, must solicit, encourage, direct, aid, or attempt to aid the witness to commit perjury.[4] Subornation of perjury consists of procuring or instigating another to commit perjury.[5] Mere conflicts in testimony do not constitute subornation of perjury.[6]

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Observation:

Under federal law,[7] conspiracy to commit perjury is also an offense separate and distinct from perjury.[8]

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Footnotes

1 Hammer v. U.S., 271 U.S. 620, 46 S. Ct. 603, 70 L. Ed. 1118 (1926).

2 18 U.S.C.A. § 1622.

3 Conn v. Com., 234 Ky. 153, 27 S.W.2d 702 (1930); In re Bixby, 31 Wash. 2d 620, 198 P.2d 672 (1948).

4 In re USA Waste Management Resources, L.L.C., 387 S.W.3d 92 (Tex. App. Houston 14th Dist. 2012).

5 U.S. v. Heater, 63 F.3d 311, 130 A.L.R. Fed. 665 (4th Cir. 1995); U.S. v. Singleton, 165 F.3d 1297 (10th Cir. 1999) (a prosecutor who procures false testimony is subject to penalty under the subornation-of-perjury statute).

6 Grandison v. State, 341 Md. 175, 670 A.2d 398 (1995).

7 18 U.S.C.A. § 1622, which provides that whoever procures another to commit any perjury is guilty of subornation of perjury and shall be fined or imprisoned not more than five years or both.

8 U.S. v. Fozo, 904 F.2d 1166, 30 Fed. R. Evid. Serv. 591 (7th Cir. 1990); U.S. v. Pendergraft, 297 F.3d 1198 (11th Cir. 2002).

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VI. Subornation of Perjury; Attempts to Suborn Perjury

A. In General

§ 85. Elements of subornation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 1, 13, 27

A.L.R. Library

Criminal liability of attorney for tampering with evidence, 49 A.L.R.5th 619

Determination of materiality of allegedly perjurious testimony in prosecution under 18 U.S.C.A. secs. 1621, 1622, 22 A.L.R. Fed. 379

In order to complete the offense of subornation of perjury, perjury must actually be committed.[1] Consequently, the statements or testimony of the suborned person must be material.[2] Moreover, the suborner must know that the suborned person's statements are false and that such person knows them to be false.[3]

Prosecutors suborn perjury only if they actually know that a prosecution witness is testifying falsely about his or her subjective beliefs, and absent such actual knowledge, the prosecutors do not suborn perjury even if they suspect or have reason to suspect that the witness is lying about his or her beliefs or if they believe that the witness' beliefs were wrong.[4]

Actual physical coercion is not an element of subornation of perjury; a defendant can instigate another's false testimony without making threats of physical harm.[5]

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Footnotes

[1] U.S. v. Hairston, 46 F.3d 361 (4th Cir. 1995); U.S. v. Brumley, 560 F.2d 1268 (5th Cir. 1977); U.S. v. Silverman, 745

F.2d 1386, 16 Fed. R. Evid. Serv. 1316 (11th Cir. 1984).

[2] U.S. v. Brumley, 560 F.2d 1268 (5th Cir. 1977); Segal v. U.S., 246 F.2d 814 (8th Cir. 1957).

[3] Petite v. U.S., 262 F.2d 788 (4th Cir. 1959); Riley v. U.S., 647 A.2d 1165 (D.C. 1994).

[4] U.S. v. Derrick, 163 F.3d 799 (4th Cir. 1998).

[5] U.S. v. Heater, 63 F.3d 311, 130 A.L.R. Fed. 665 (4th Cir. 1995).

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VI. Subornation of Perjury; Attempts to Suborn Perjury

A. In General

§ 86. Attempt to suborn

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Perjury 14, 28

A.L.R. Library

Criminal liability of attorney for tampering with evidence, 49 A.L.R.5th 619

Construction and effect of statutes making solicitation to commit crime a substantive offense, 51 A.L.R.2d 953

The offense of attempted subornation of perjury links the intent to procure false testimony with the act of soliciting an agreement to testify falsely although such testimony is ultimately not given.[1] Hence, the offense of attempted subornation of perjury is made out whenever an accused instigates and procures the agreement of a prospective witness to testify falsely,[2] and it is a necessary element of the crime that both the accused and the person to be suborned know that the testimony sought to be elicited is false[3] and material.[4]

A pending or potentially pending legal proceeding is not a required element of attempted subornation of perjury; it is not necessary to show that the person suborned testified falsely or, indeed, testified at all.[5]

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Footnotes

1 Riley v. U.S., 647 A.2d 1165 (D.C. 1994).

2 State ex rel. Oklahoma Bar Ass'n v. Eakin, 1995 OK 106, 914 P.2d 644 (Okla. 1995), as amended on reh'g, (Dec. 12, 1995).

[3] State v. Potts, 154 Me. 114, 144 A.2d 261 (1958); State ex rel. Oklahoma Bar Ass'n v. Eakin, 1995 OK 106, 914 P.2d 644 (Okla. 1995), as amended on reh'g, (Dec. 12, 1995).

[4] State ex rel. Oklahoma Bar Ass'n v. Eakin, 1995 OK 106, 914 P.2d 644 (Okla. 1995), as amended on reh'g, (Dec. 12, 1995).

[5] State ex rel. Oklahoma Bar Ass'n v. Eakin, 1995 OK 106, 914 P.2d 644 (Okla. 1995), as amended on reh'g, (Dec. 12, 1995).

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